No. 98-97-CFX

Title: Eloise Anderson, Director, California Department of Social Services, et al., Petitioners
v.
Brenda Roe and Anna Doe, etc.

Docketed:
July 20, 1998

Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Apr 12 1998	CIRCULATED.
	Jul 9 1998	Petition for writ of certiorari filed. (Response due August 19, 1998)
	Jul 31 1998	Motion of United States Justice Foundation, et al. for leave to file a brief as amici curiae filed.
	Aug 17 1998	Brief amicus curiae of Pacific Legal Foundation filed.
	Aug 18 1998	Brief of respondents Brenda Roe and Anna Doe, et al. in opposition filed.
	Aug 19 1998	Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae filed.
	Aug 19 1998	Brief amici curiae of Pennsylvania, et al. filed.
	Sep 2 1998	DISTRIBUTED. September 28, 1998
	Sep 3 1998	Reply brief of petitioners Eloise Anderson, et al. filed.
	Sep 18 1998	Supplemental brief of respondents Brenda Roe, et al. filed.
	Sep 25 1998	Supplemental brief of petitioners Eloise Anderson, et al. filed.
	Sep 29 1998	Motion of United States Justice Foundation, et al. for leave to file a brief as amici curiae GRANTED.
	Sep 29 1998	Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae GRANTED.
	Sep 29 1998	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 10, 1998. The brief of respondents is to be filed with the Clerk and served uopn opposing counsel on or before 3 p.m., Tuesday, December 8, 1998. A reply brief, if any, is to be filed with the Clerk and served uopn opposing counsel on or before 3 p.m., Tuesday, December 29, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT January 13, 1999. **********
	Nov 10 1998	Brief amicus curiae of Institute for Justice filed.
	Nov 10 1998	Brief of petitioners Eloise Anderson, et al. filed.
	Nov 10 1998	Joint appendix filed.
	Nov 10 1998	Brief amici curiae of Pennsylvania, et al. filed.
	Nov 10 1998	Brief amicus curiae of Pacific Legal Foundation filed.
	Nov 10 1998	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Nov 10 1998	Brief amici curiae of National Governor's Association, et al. filed.
	Nov 10 1998	Brief amicus curiae of United States filed.
	Dec 7 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Dec 8 1998	Brief amicus curiae of Sixty-Six Organizations serving

No. 98-97-CFX

Entry	Date	Proceedings and Orders
		Domestic Violence Survivors filed.
	Dec 8 1998	Brief amicus curiae of Social Scientists filed.
	Dec 8 1998	Brief amici curiae of William Cohen, et al. filed.
	Dec 8 1998	Brief amici curiae of Brennan Center for Justice at N.Y.U. School of Law, et al. filed.
	Dec 8 1998	Brief of respondents Brenda Roe, et al. filed.
	Dec 8 1998	Brief amicus curiae of American Bar Association filed.
	Dec 8 1998	Brief amicus curiae of National Law Center on Homelessness, etc. filed.
	Dec 8 1998	Brief amici curiae of Acorn, et al. filed.
	Dec 8 1998	Brief amici curiae of Catholic Charities USA, et al. filed.
	Dec 11 1998	LODGING consisting of ten copies of non legal sources submitted by counsel for amici Sixty-six Organizations Serving Domestic Violence Survivors received.
	Dec 14 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Dec 29 1998	Reply brief of petitioners Eloise Anderson, et al. filed.
	Jan 6 1999	Record filed.
	Jan 13 1999	ARGUED.

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No. 98

In The

Supreme Court of the United States

October Term, 1997

ELOISE ANDERSON, Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; and CRAIG L. BROWN, Director, California Department of Finance,

Petitioners,

v.

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a trial court abuse its discretion by subjecting to strict scrutiny a federally-authorized statute which does not penalize any fundamental right, and which merely limits a new resident's welfare benefits to the level of benefits received or receivable in the state of prior residence for a period of one year?

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Eloise Anderson, Director, California Department of Social Services; California Department of Social Services; The Honorable Pete Wilson, Governor of the State of California; and Craig L. Brown, Director, California Department of Finance (hereafter, "California") respectfully request this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on January 28, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") in *Roe v. Anderson*, 134 F.3d 1400 (9th Cir. 1998) entered on January 28, 1998, is reproduced in the Appendix at A1. The order of the Ninth Circuit dated April 10, 1998, denying California's petition for rehearing is reproduced in the Appendix at A34. The order of the trial court granting plaintiffs' motion for preliminary injunction and referred to in the Ninth Circuit opinion is also reproduced in the Appendix at A13. *Roe v. Anderson*, 966 F. Supp. 977 (E.D. Cal. 1997).

JURISDICTION

On January 28, 1998, the Ninth Circuit issued its opinion affirming the decision of the United States District Court ("the trial court") that a California welfare statute operates as a penalty on the right to travel and

therefore must be subjected to strict scrutiny. This Court has jurisdiction to review, by way of writ of certiorari, the judgment or decree of the Ninth Circuit. 28 U.S.C. § 1254(1).

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, on February 13, 1998, California timely petitioned the Ninth Circuit for rehearing. On April 10, 1998, the petition for rehearing was summarily denied.

RELEVANT STATUTORY PROVISIONS

California Welfare and Institutions Code section 11450.03:

> (a) Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.
>
> (b) This section shall not become operative until the date of approval by the United States Secretary of Health and Human Services necessary to implement the provisions of this section so as to ensure the continued compliance of the state plan for the following:
>
> (1) Title IV of the federal Social Security Act (Subchapter 4 (commencing with Section 601) of Chapter 7 of Title 42 of the United States Code).

> (2) Title IX of the federal Social Security Act (Subchapter 19 (commencing with Section 1396) of Chapter 7 of Title 42 of the United States Code).
>
> (Added by Stats. 1992, c. 722 (S.B.485), § 37.5, eff. Sept. 15, 1992.)

42 United States Code section 604(c):

> A state operating a program funded under this part may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months.

STATEMENT OF THE FACTS

Aid to Families with Dependent Children ("AFDC") has historically been California's largest welfare payments program.[1] In the most recent fiscal year for which actual expenditures were available (fiscal year 1995-1996),

[1] The federal AFDC program was repealed and replaced with a new program named Temporary Assistance to Needy Families ("TANF") as part of federal welfare reform. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, Title I, § 103(a)(1), Aug. 22, 1996, 110 Stat. 2112. On January 1, 1998, California's welfare program was renamed the California Work Opportunity and Responsibility to Kids Program, referred to as CalWORKs. California Welfare and Institutions Code sections 10063 and 11200. Because this change occurred so recently, this brief will continue to refer to the welfare benefits at issue as "AFDC benefits." The substitution of TANF and CalWORKs for the federal and state AFDC programs does not affect California's ability to implement the durational residency requirement at issue here.

California provided AFDC to an average of 2,645,814 persons per month, at an annual cost of $6 billion. Of that total amount, $2.9 billion came from the California state general fund. Declaration of Bruce Wagstaff, "Wagstaff Declaration," A36.[2]

Based on information provided by the United States Department of Health and Human Services for the fiscal year 1996-1997, California had the sixth highest grant level in the United States and the highest grant level of the 10 most populous states. Wagstaff Declaration, A36. Although California accounted for 29 percent of all money spent nationwide on the AFDC program, and 20 percent of the national AFDC caseload, it had only 12 percent of the nation's population. Wagstaff Declaration, A36-37.

In 1992, a time of continuing economic and fiscal problems in California, the state initiated a federally approved, time-limited experimental project to reform the mammoth AFDC program. Declaration of Dennis Hordyk, attached to Declaration of Theodore Garelis, "Garelis Declaration", and Garelis Declaration, A42 and 44. In conjunction with this experimental project, the California Legislature enacted in 1992, with strong bipartisan

[2] All evidentiary materials reproduced in the Appendix were presented to the trial court.

support, California Welfare and Institutions Code section 11450.03 ("section 11450.03").[3]

Section 11450.03 provides for a durational residency requirement for the provision of AFDC benefits. Under this statute, new California residents will receive for one year the same amount of AFDC benefits they received, or would have received, in their state of prior residence.

The experimental project referred to above included not only section 11450.03[4] but work incentive grant reductions, extension of the earnings disregard under which working AFDC recipients can keep more of their earnings without a corresponding reduction in benefits, and elimination of the 100-hour rule under which two-parent AFDC recipient families may remain eligible for benefits despite working more than 100 hours per month. *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994). In 1993, the California Legislature amended the experiment to add new and important elements to the reform effort: (1) an increase from $1,000 to $2,000 in the value of resources an

[3] Senate Bill 485, the precursor to section 11450.03, passed in the California Senate on a vote of 21 to 11. It passed in the California Assembly on a vote of 54 to 25. The Senate concurred in the Assembly amendments on a vote of 29 to 9. California Senate Final History 1991-1992, Regular Session, Volume I, pp. 381-382.

[4] The experimental project was terminated as of January 1, 1998, as a result of the replacement of the federal AFDC program by TANF and the enactment of the CalWORKs program. Section 11450.03 was removed from the experimental project in 1996. Its removal from that program was a condition of California's obtaining a renewed waiver of 42 U.S.C. section 1396a(c), the Medicaid Maintenance of Effort requirement. Garelis Declaration, A42 and Exhibit C thereto, A52.

AFDC family can possess and still qualify for benefits, Welf. & Inst. Code § 11155.1(a); (2) an increase in the allowable value of the recipient family's automobile from $2,000 to $4,500, Welf. & Inst. Code § 11155.1(a); (3) enhanced child care funding; and (4) the CalLearn Program, which is a $50 million program providing pregnant and parenting teens with cash bonuses for satisfactory school progress, intensive case management services, child care, and other supportive services, Welf. & Inst. Code § 11331, et seq.

In order to implement the experimental project, including section 11450.03, California obtained waivers of various provisions of federal statutes and regulations, including the Medicaid Maintenance of Effort requirement and various provisions of regulations at 45 Code of Federal Regulations sections 233.20(a)(1) and (2). Garelis Declaration, A42 and Exhibit B thereto, A47.

In response to a challenge on constitutional grounds to California's implementation of section 11450.03, the trial court issued a temporary restraining order on December 22, 1992, enjoining California from implementing the provisions of section 11450.03 pending a hearing on plaintiffs' request for a preliminary injunction. The preliminary injunction was issued by the trial court from the bench on January 28, 1993. *Green v. Anderson*, 811 F. Supp. 516, 523 (E.D. Cal. 1993).

California filed an appeal from the preliminary injunction. On April 29, 1994, the Ninth Circuit summarily affirmed the trial court's order granting the preliminary injunction. *Green v. Anderson*, 26 F.3d 95 (9th Cir.

1994). This Court subsequently granted California's petition for writ of certiorari. *Anderson v. Green*, 513 U.S. 922 (1994). Following briefing and oral argument, this Court held that no justiciable controversy was before it because the action in its then current posture was not ripe. *Anderson v. Green*, 513 U.S. 557 (1995). This was a result of the vacation by the Ninth Circuit of one of the waivers of federal law (the Medicaid Maintenance of Effort requirement) necessary for implementation of section 11450.03. *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994).

Subsequently, California requested a renewed waiver of the Medicaid Maintenance of Effort requirement from the Secretary of the United States Department of Health and Human Services. That renewed waiver was granted, but, at the same time, the Secretary retracted the waiver of federal authority necessary for implementation of section 11450.03. Garelis Declaration, A42 and Exhibit C thereto, A52.

As a result of Congressional efforts to redesign an out-of-date welfare system, on August 22, 1996, President Clinton signed the federal welfare reform bill, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), 42 U.S.C. § 601, et seq. The federal AFDC program was repealed and replaced with a new program, Temporary Assistance to Needy Families ("TANF"). One of the major differences between the new TANF program and the old AFDC program is that under TANF, welfare benefits are no longer entitlements. 42 U.S.C. § 601(b). Additionally, as part of PRWORA, Congress specifically authorized states to enact durational residency requirements, such as section 11450.03, in their individual TANF plans. 42 U.S.C. § 604(c). The obvious

rationale for congressional authorization of durational residency requirements was to avoid the creation of country-wide welfare magnets in high benefit-level states. Congress thus protected states that use their block grants for high benefit levels from becoming "welfare magnets."

Pursuant to the authorization contained in PRWORA, on February 28, 1997, California once again instructed its counties to implement section 11450.03 beginning April 1, 1997. Plaintiffs then moved to block implementation of section 11450.03, by filing the underlying complaint for declaratory and injunctive relief ("the complaint") on April 1, 1997. Plaintiffs contended that section 11450.03 violated various provisions of the United States Constitution and the constitutional right to travel. A7-9.

The complaint named the California Department of Social Services, the directors of the California Departments of Social Services and Finance and the governor of the State of California as defendants. Plaintiffs are a class of California residents who have applied or will apply for benefits on or after April 1, 1997, and who have not resided in California for twelve consecutive months immediately preceding their application for aid. Jurisdiction was conferred on the District Court by 28 United States Code section 1343(a)(3). This suit was brought pursuant to 28 United States Code section 1983.

On April 1, 1997, the District Court granted plaintiffs' application for a temporary restraining order and enjoined implementation of section 11450.03 pending a hearing on plaintiffs' request for a preliminary injunction. A20. Plaintiffs' request for a preliminary injunction was

heard on May 16, 1997. A41. The District Court took the matter under submission and issued an order on June 4, 1997, granting the preliminary injunction. The District Court based its ruling on a finding that section 11450.03 penalizes the right to travel. *Roe v. Anderson*, 966 F. Supp. 977 (E.D. Cal. 1997); A13.

California appealed the order granting the preliminary injunction to the Ninth Circuit. On January 28, 1998, the Ninth Circuit issued an opinion affirming the order of the District Court. *Roe v. Anderson*, 134 F.3d 1400 (9th Cir. 1997); A1. The Ninth Circuit based its erroneous holding on its earlier opinion in *Green* that implementation of section 11450.03 penalizes the right to travel and thus should be subjected to a strict scrutiny standard of review. The Ninth Circuit also based its opinion on an incorrect statement of the standard of review for preliminary injunctive relief, departing from controlling precedent of this Court. A3, fn. 1. California sought rehearing only as to the incorrect standard of review, without waiving future review of other issues raised by the Ninth Circuit's opinion. On April 10, 1998, the Ninth Circuit summarily denied California's request for rehearing.[5]

Relying at least in part on the congressional authorization conferred by PRWORA, other states have enacted

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[5] California respectfully takes issue with the incorrect articulation of the standard of review by the Ninth Circuit. Despite the incorrect articulation of the standard of review, the Ninth Circuit acknowledged that an abuse of discretion will be found where the trial court "base[s] its ruling on an erroneous view of the law" A3, fn.1. As argued below, the trial court did base its ruling on an erroneous view of the law, thus abusing its discretion in granting the preliminary injunction.

similar durational residency requirements. These states include, among others, Rhode Island, *Westenfelder v. Ferguson*, C.A. No. 97-478L, 1998 U.S. Dist. Lexis 3621 (D. R.I. Mar. 18, 1998) (order granting preliminary injunction), *appeal docketed*, No. 98-1431 (1st Cir. May 14, 1998); Pennsylvania, *Maldonado v. Houstoun*, 177 F.R.D. 311 (E.D. Pa. Oct. 6, 1997) (order granting preliminary injunction), *appeal docketed*, No. 97-1893 (3rd Cir. Nov. 20, 1997); Minnesota, *Davis et al. v. Doth*, No. 62-C6-97-010231 (Minn. St. Dist. Ct. Dec. 5, 1997) (order granting temporary injunction); Washington, *Ruffin, et al. v. Quasim*, No. C97-5767 FDB (W.D. Wa. Feb. 6, 1998) (order granting preliminary injunction); and New Jersey, *Sanchez v. Department of Human Services*, No. A-000466-97T5 (N.J. Super. Ct. App. Div. filed Sept. 16, 1997).

REASONS FOR GRANTING THIS PETITION

Four years ago, this Court granted certiorari to consider the constitutionality of section 11450.03. *Anderson v. Green*, 513 U.S. 992 (1994). However, the merits of California's arguments were not addressed at that time because this Court held that no justiciable controversy existed because the matter in its then current posture was not ripe, due to the loss by California of a certain waiver of federal law necessary for implementation of section 11450.03. *Anderson v. Green*, 513 U.S. 557 (1995). Because both that provision of federal law and the AFDC program were repealed as part of PRWORA, the factual basis underlying this Court's determination in *Green* no longer exists. Apart from the preliminary injunction granted by the trial court, nothing now prevents California from

fully implementing section 11450.03. Therefore, this Court should now grant this petition to enable review of substantially the same question for which this Court granted certiorari in 1994.

A petition for writ of certiorari is granted by this Court "only for compelling reasons." Rule 10 of the United States Supreme Court. Review may be granted when a United States Court of Appeals has decided an "important question of federal law which has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id.*

This Court has yet to decide and give guidance to the lower courts as to the correct standard of constitutional scrutiny of statutes which mandate that newcomers to a state continue to receive, for a limited period of time, the same level of benefits they would have received in their state of prior residence. As implicitly recognized by Congress, such statutes do not penalize the right to travel. Unlike other statutes addressed by this Court, California's durational residency requirement does not affect *eligibility* and does not create *permanent* distinctions between California residents. Instead, section 11450.03 merely affects benefit *levels* on a temporary basis. Under prior decisions of this Court, such statutes are customarily analyzed under the rational basis standard of review.

This Court should seize the opportunity to provide essential guidance to the states and lower courts on this important issue of constitutional law, and find that a

statute which does not penalize interstate travel should be subjected only to a rational basis analysis.

I.

REVIEW SHOULD BE GRANTED IN ORDER TO PROVIDE GUIDANCE TO THE STATES AND THE LOWER COURTS THAT A STATUTE WHICH DOES NOT PENALIZE TRAVEL SHOULD BE SUBJECTED ONLY TO A RATIONAL BASIS ANALYSIS

In an attempt to reform the welfare system of this country, the states have been experimenting with a variety of creative solutions to assist their indigent populations become independent of public assistance. One of the creative solutions which some states have adopted is a durational residency requirement. This particular solution has been authorized by Congress in PRWORA, the federal welfare reform act. 42 U.S.C. § 604(c).

However, the ability of the states to implement durational residency requirements has been stymied by the application of an incorrect standard of review when such statutes are challenged on constitutional grounds. In recent litigation, courts have relied upon *Shapiro v. Thompson*, 394 U.S. 619 (1969) and its progeny, and applied a strict scrutiny analysis, appropriate only when a fundamental right is penalized or a suspect class is impacted. However, the implementation of durational residency requirements penalizes no fundamental right and impacts no suspect class. Even so, the Ninth Circuit has assumed that durational residency requirements penalize a fundamental right, specifically, the right to travel. Although other trial courts have similarly held, a federal district court in Pennsylvania recently held that

Pennsylvania's durational residency requirement does not penalize the right to travel. Finding that *Shapiro* was not implicated by Pennsylvania's statute, the court therefore applied a rational basis standard of review to the statute. *Maldonado v. Houstoun*, 177 F.R.D. 311 (E.D. Pa. Oct. 6, 1997) (order granting preliminary injunction), *appeal docketed*, No. 97-1893 (3rd Cir. Nov. 20, 1997).

In its opinion affirming the trial court's order granting a preliminary injunction, the Ninth Circuit held that the trial court did not err in determining that plaintiffs had demonstrated a probability of success on the merits. The Ninth Circuit based its holding on its prior opinion, *Green v. Anderson*, 26 F.3d 95 (9th Cir 1994), summarily affirming the prior preliminary order enjoining implementation of section 11450.03. *Roe v. Anderson*, 134 F.3d 1400 (9th Cir 1997). The *Green* trial court had found that section 11450.03 penalized the right to travel and therefore should be subjected to a strict scrutiny analysis. *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993).

However, the Ninth Circuit erred on both occasions. Statutes, such as the one at issue here, with a primary focus on setting benefit levels, should be analyzed under the same rational basis standard to which public welfare assistance statutes are normally subjected. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

This repeated fundamental error of analysis prevents not just California, but many other states, from implementing creative, and constitutionally permissible, solutions to the question of welfare reform. In light of this

repeated error, and in light of the congressional authorization conferred by PRWORA, review by this Court is necessary.

II.

SECTION 11450.03 DOES NOT OPERATE AS A PENALTY ON TRAVEL AND THEREFORE SHOULD BE SCRUTINIZED ONLY UNDER A RATIONAL BASIS ANALYSIS

When a state distributes benefits unequally, the distinctions it makes are subject to review under the Equal Protection Clause of the Fourteenth Amendment. The statutory scheme must pass the rationality test at a minimum. *Zobel v. Williams*, 457 U.S. 55, 60 (1982). Generally, a law will survive such scrutiny if the distinction rationally furthers a legitimate state purpose. A rational basis analysis is the appropriate constitutional review for statutes involving the administration of public welfare assistance. *Dandridge*, 397 U.S. at 485.

The trial court and the Ninth Circuit relied upon *Shapiro*, and its progeny, in holding that section 11450.03 should be subjected to a strict scrutiny analysis. In *Shapiro*, this Court held that legislation which denied welfare assistance outright to new state residents of less than one-year duration was constitutionally impermissible because, as such legislation "touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest." *Shapiro*, 394 U.S. at 638.

To characterize *Shapiro* as barring implementation of section 11450.03 is totally unjustified, as this Court has left just such a question open in that case. In a footnote, this Court indicated:

> We imply no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.

394 U.S. at 638, n. 21.

Thus, in *Shapiro*, this Court determined only that the complete denial of welfare assistance for a full year penalized the plaintiffs' right of interstate movement. This Court did *not* determine that any durational residency requirement, no matter how carefully crafted, penalizes the right to travel.

This Court refined its analysis of legislation affecting the right to travel in *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 258-259 (1974). There, this Court stated that *Shapiro* "stand[s] for the proposition that a classification which 'operates to *penalize* those persons . . . who have exercised their constitutional right of interstate migration,' must be justified by a compelling state interest," 415 U.S. at 258, but repeated its prior statement in *Shapiro*, that "some 'waiting period[s] . . . may not be penalties.' " *Id.* at 258-259.

In both *Shapiro* and *Memorial Hospital*, the plaintiffs' right to travel was penalized because they were put in a

worse position by application of the statutes at issue after they moved to their new states. In *Shapiro*, the plaintiffs had a right to receive welfare assistance in their state of prior residence. After moving, they were no longer eligible for welfare assistance for a full year. In *Memorial Hospital*, the plaintiffs had a right to state-funded, non-emergency medical care before they moved. After they moved to Arizona, they were not eligible for non-emergency medical care for a period of twelve months. Thus, in both cases, the plaintiffs lost their eligibility for public assistance due solely to their moving to a new state. As a result, this Court determined that their right to travel had been penalized.

California's ability to implement section 11450.03 is unaffected by the holdings of *Shapiro* and *Memorial Hospital*. Unlike the plaintiffs in *Shapiro* and *Memorial Hospital*, plaintiffs here have not lost any *eligibility* to public assistance they enjoyed in their state of prior residence. California has no waiting period to establish *eligibility*. California does not deny plaintiffs the ability to travel to California. Section 11450.03 thus does not penalize the right to travel.[6]

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[6] Plaintiffs essentially argue that without the guarantee of a certain benefit level, they cannot move to California. They are, therefore, arguing that California is constitutionally obligated to fund their move. No other newcomers to California have the ability to demand a certain payment level upon their decision to move to a new home – nor should they. As a general matter, a state is under no duty to subsidize the costs of the exercise of constitutional rights. In *Harris v. McRae*, 448 U.S. 297, 317-318 (1980), this Court held that a woman's freedom of choice does not carry with it a constitutional entitlement to the financial resources necessary to exercise that freedom. Here, California has not prohibited travel or placed a substantial obstacle in the way of a newcomer's move to California; it has simply limited welfare benefit levels for recent California residents to no more than they received or would have received in their state of prior residence. New residents are free to travel to California, and AFDC benefits remain available for recent California residents.

Citing *Zobel v. Williams*, 457 U.S. 55 (1982), the trial court determined that the relevant comparison is not between newcomers to California and residents of other states, but between newcomers and existing California residents. However, the right to travel of existing residents is not even potentially impacted by section 11450.03. If section 11450.03 does impact the right to travel, then that impact is caused by the decision to travel and should therefore be judged by its effect on persons who have traveled, or who may potentially travel, to California and not by a comparison involving existing California residents. Because only residents who have recently traveled to California are subject to the provisions of section 11450.03, the relevant constitutional inquiry is whether those recently arrived residents suffer a detriment due to a decision to travel to California. To determine whether such a detriment exists, one must compare the position of newcomers before and after travel to California.

Here, plaintiffs have no change in their position and will suffer no detriment, as to receipt of AFDC benefits upon moving to California. Plaintiffs will receive AFDC benefits in the same amount they received, or would have received, in their state of prior residence. As such, they suffer no detriment and are not penalized by moving to California.

To compare recent arrivals with longer-term California residents for the purpose of analyzing the existence of a penalty on the right to travel is to compare apples to oranges. As noted above, longer-term California residents are, by definition, not impacted by section 11450.03 since any decision to travel to California has already been made. Therefore, such a comparison does not involve questions of travel. Such a comparison is, instead, purely a question of benefit levels and must be reviewed under a rational basis analysis. *Dandridge*, 397 U.S. at 485.

That section 11450.03 does not penalize the right to travel is consistent with *Zobel*. There, income from oil reserves was distributed by Alaska to its residents based upon length of state residency, thus creating *permanent* classifications. This Court in *Zobel* stated, 457 U.S. at 58, that the Alaska statute is quite unlike the durational residency requirements examined in *Shapiro* and *Memorial Hospital*. Because this Court concluded in *Zobel* that the Alaska statute lacked a rational basis, the Court did not engage in an analysis of whether the Alaska statute triggered strict scrutiny due to its impact on travel. Therefore, *Zobel* did not compel the lower courts to engage in the fiction of determining whether newcomers have been penalized by section 11450.03 by comparing newcomers with existing residents.[7]

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[7] Plaintiffs argue that because California's cost of living is generally higher than elsewhere, the benefits provided for by section 11450.03 operate as a penalty on new residents. This argument assumes, however, that the benefits received in the prior state of residence bear some rational relationship to the standard of need or the cost of living in that state and that the cost of living in the California community to which plaintiffs have moved is in fact higher than in their state of prior residence. This assumption is wrong as there is no requirement for benefit levels to be related to anything other than budgetary constraints. Under the former AFDC program, many states had constitutionally adequate benefit levels much lower than the standard of need. *King v. Smith*, 392 U.S. 309, 334 (1968); *Dandridge v. Williams*, 397 U.S. 471, 480 (1970). The states have "undisputed power" under the Social Security Act "to set [both] the level of benefits and the standard of need" in the AFDC program. *King*, 392 U.S. at 334; *Jefferson v. Hackney*, 406 U.S. 535, 541, 545 (1972). This power of the states to set benefit levels is even less subject to dispute under TANF than under AFDC, as the benefits at issue are no longer entitlements. 42 U.S.C. § 601(b).

Nor are plaintiffs handicapped by the creation of *permanent* distinctions among residents and newcomers as were the plaintiffs in *Zobel*, *State Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986), and *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985). The statute at issue in *Attorney General of New York v. Soto-Lopez* determined eligibility for veterans' preferences for civil service based upon state residency at the time of induction into the armed forces. Similarly, the statute at issue in *Hooper v. Bernalillo County Assessor* determined eligibility for a property tax exemption based upon residency before a specific date. Persons subject to section 11450.03 do not have their *eligibility* for AFDC benefits determined upon California residency.

Section 11450.03 does not affect eligibility. All persons subject to the provisions of section 11450.03 have been determined to be eligible for benefits in California. Unlike plaintiffs in *Shapiro*, *Memorial Hospital*, *Hooper*, and *Soto-Lopez*, plaintiffs here are not foreclosed from AFDC

benefits under section 11450.03. Only the level of AFDC benefits plaintiffs will receive is affected by section 11450.03. Yet it is clear that statutes involving the administration of public welfare assistance (including the setting of benefit levels) are analyzed under a rational basis standard. *Dandridge v. Williams*, 397 U.S. 471 (1970). Plaintiffs have not shown how a change in benefit levels implemented under a durational residency requirement differs from other statutes involving the administration of public welfare assistance.

Under plaintiffs' theory, any difference in the level of any government service or benefit between states (or even a difference in laws pertaining to social, economic or domestic spheres) arguably impacts the decision to travel to another state, and could therefore penalize the right to travel. This argument, of course, leads to absurd results. States do not, and do not have to, maintain either similar welfare benefit levels,[8] *Dandridge*, 397 U.S. at 480, or, for that matter, similar requirements relating to domestic relations, *Sosna v. Iowa*, 419 U.S. 393 (1975). Simply put, each state has its own distinct laws impacting the life of its residents, both old and new. Differences between states, even though at times major, do not penalize the right to travel. There is no constitutional guarantee that a move to a new state will come without differences.

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[8] If plaintiffs' argument were valid, it would then be unconstitutional for each state to maintain its own unique benefit level. Any state with a lower grant level than another state would be constitutionally required to raise its grant level, so as not to impact the right to travel.

Thus, because section 11450.03 does not operate as a penalty on the right to travel to California, the lower courts erred in determining that section 11450.03 should be subjected to strict scrutiny. Thus, review should be granted by this Court to address an important question of federal law that has not been, but should be, settled by this Court in order to provide guidance to the states and the lower courts.

CONCLUSION

Review should be granted by this Court to decide an important question of federal law that has not been, but should be, settled by this Court.

The recent Congressional authorization of durational residency requirements renders it imperative for the states and the lower courts to be clear as to the correct standard of constitutional review. An incorrect formulation of the standard of constitutional review puts inappropriate and unnecessary road blocks in the path of states pursuing congressionally-mandated welfare reform.

Section 11450.03 has been narrowly tailored to adjust AFDC benefit levels without penalizing the right to travel. To maintain that section 11450.03 "penalizes" the right to travel by neutralizing only one factor in a person's decision to move to California is an act of pure legal fiction. As shown above, newcomers to California are not prevented from traveling to California by section 11450.03. Section 11450.03 simply recognizes the fact that

California is not obligated to fund the exercise of a constitutional right.

For these reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated, *Plaintiffs-Appellees,* v. ELOISE ANDERSON, Director of the California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; CRAIG BROWN, Director of the California Department of Finance, *Defendants-Appellants.*	No. 97-16326 D.C. No. CIV-S-97-0559 DFL/JFM OPINION

Appeal from the United States District Court
for the Eastern District of California
Honorable David F. Levi, District Judge, Presiding

Argued and Submitted
December 11, 1997 – San Francisco, California

Filed January 28, 1998

Before: Betty B. Fletcher and Thomas G. Nelson,
Circuit Judges, and Robert H. Whaley,* District Judge.

* Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

Opinion by Judge Fletcher

COUNSEL

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Mark Rosenbaum, ACLU of Southern California, for the plaintiffs-appellees.

OPINION

FLETCHER, Circuit Judge:

The State of California appeals the grant of a preliminary injunction to Brenda Roe, Anna Doe, and a certified class of all others similarly situated, who brought an equal protection claim under 42 U.S.C. § 1983 to prevent California from implementing Welfare and Institutions Code § 11450.03. That statute limits benefits to new residents in California for their first year of residency to the amount that they received under the Aid to Families with Dependent Children (AFDC) program in their state of prior residence. We affirm.

I.

We review on appeal the grant of a preliminary injunction. We have repeatedly instructed that

> to obtain a preliminary injunction, the moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips in its favor. These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.

United States v. Nutri-cology, Inc., 982 F.2d 394, 397 (9th Cir. 1992) (citations and internal quotation marks omitted). The grant of a preliminary injunction is reviewed for abuse of discretion,[1] and that discretion is abused where

[1] A district court's order regarding preliminary injunctive relief is subject only to "limited review." The grant or denial of a preliminary injunction will be reversed "only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996) (citing *Miller v. California Pac. Med. Ctr.*, 19 F.3d 449, 455 (9th Cir. 1994) (en banc)).

Although we have previously suggested that issues of law underlying the district court's decision on the preliminary injunction are reviewed de novo, *Metro Publishing, Ltd. v. San Jose Mercury News*, 987 F.2d 637, 640 (9th Cir. 1993), the Supreme Court has expressly rejected any multi-tiered standard of review for abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (Rule 11). "Rather, an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination. A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.*

This single-tier formulation of the abuse of discretion standard of review has been subsequently adopted in numerous other contexts. *See, e.g., Koon v. United States*, 116 S. Ct. 2035, 2047-48 (1996) (sentencing guidelines); *Schlup v. Delo*, 513 U.S. 298, 333 (1995) (fundamental miscarriage of justice exception in capital habeas) (O'Connor, J., concurring); *United States v. Morales*, 108 F.3d 1031, 1035 (9th Cir. 1997) (expert testimony); *Osorio v. INS*, 99 F.3d 928, 932 (9th Cir. 1996) (grant of asylum); *Flores v. Shalala*, 49 F.3d 562, 567 (9th Cir. 1995) (attorney's fees); *Stock West Corp. v. Taylor*, 964 F.2d 912, 918 (9th Cir. 1992) (comity and abstention in determining tribal court jurisdiction).

the district court "based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

Thus, we review only the district court's consideration of the likelihood of success on the merits at one end of the scale, and the possibility of irreparable harm at the other end of the scale. We do not decide the merits. *See L.A. Mem'l Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1198 (9th Cir. 1980) (declining to reach the merits on review of the grant of preliminary injunction although "strenuously urged by the parties").

A.

While neither party suggests that the district court applied the wrong preliminary injunction standard, California argues on appeal that the district court misapprehended the law with respect to the underlying issues of equal protection and the fundamental right to travel. As a result, California argues that the district court erred in its determination of plaintiffs' probability of success on the merits.

1.

Section 11450.03 of the California Welfare and Institutions Code, enacted in 1992, provides that "families that have resided in this state for less than 12 months" and who qualify for welfare shall receive benefits no greater than the "maximum aid payment that would have been

received by that family from the state of prior residence."[2] Under this provision, new California residents from lower-benefits states would receive that lower level of benefits throughout the first year of their residency in California.

California first sought to implement this durational residency requirement in 1992, pursuant to the grant of relevant waivers by the Secretary of Health and Human Services. However, the district court judge, the same

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[2] Section 11450.03 states in full:

(a) Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.

(b) This section shall not become operative until the date of approval by the United States Secretary of Health and Human Services necessary to implement the provisions of this section so as to ensure the continued compliance of the state plan for the following:

(1) Title IV of the federal Social Security Act (Subchapter 4 (commencing with Section 601) of Chapter 7 of Title 42 of the United States Code).

(2) Title IX of the federal Social Security Act (Subchapter 19 (commencing with Section 1396) of Chapter 7 of Title 42 of the United States Code). (added by Stats. 1992, c. 722 (S.B.485), § 37.5, eff. Sept. 15, 1992).

judge that presided in the instant case, granted a preliminary injunction at that time against implementation of § 11450.03 after determining that the distinction among California residents based on the duration of their residency was unconstitutional. The district court relied on a line of Supreme Court cases addressing durational residency provisions in a variety of contexts. *See Green v. Anderson*, 811 F. Supp. 516, 518-23 (E.D. Cal. 1993), *aff'd*, 26 F.3d 95 (9th Cir. 1994), *vacated as unripe*, 513 U.S. 557 (1995).[3]

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[3] The Supreme Court, after granting *certiorari*, vacated as unripe the district court's decision (summarily affirmed by this court) granting the preliminary injunction against implementation of § 11450.03 due to intervening litigation that struck the necessary grant of waivers from the Secretary of Health and Human Services. *See Beno v. Shalala*, 30 F.3d 1057, 1076 (9th Cir. 1994). Because § 11450.03, by its own terms, was no longer applicable, the Supreme Court determined that "[t]he parties have no live dispute now, and whether one will arise in the future is conjectural." *Anderson v. Green*, 513 U.S. 557, 559 (1995). As a result, the Court decided that "[v]acatur is appropriate, therefore, to 'clea[r] the path for future relitigation of the issues between the parties and [to] eliminat[e] a judgment, review of which was prevented through happenstance.' " *Id.* at 560 (citation omitted).

In February 1996, the Secretary again granted waivers for most of California's welfare program, but expressly withheld the waiver that would have permitted California to implement the residency requirement. Nevertheless, in August 1996, Congress enacted a new federal welfare law, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), 42 U.S.C. §§ 601, et seq., that specifically authorized the states to apply a durational residency requirement of the type found in § 11450.03 to those who have "resided in the State for less than twelve months" without additional waivers. The PRWORA superceded [sic] the AFDC

Brenda Roe and Anna Doe, different plaintiffs than those in *Green v. Anderson*, commenced the instant action on April 1, 1997, each having recently moved to California seeking employment and being eligible for assistance. They argued that, due to the higher cost of living in California, the relatively lower level of assistance established by § 11450.03 threatened them with imminent deprivation of the basic necessities of life. That same day, the district court entered a temporary restraining order enjoining implementation of § 11450.03, pending a hearing on plaintiffs' request for a preliminary injunction, and granting plaintiffs' motion to proceed under fictitious names. On April 23, 1997, on the stipulation of the parties, the district court permitted the instant action to be maintained as a class action.[4]

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program with a new program entitled Temporary Assistance to Need Families ("TANF") that significantly increased the states' discretion to design their federally supported welfare plans without seeking waivers from the Secretary. *See* 42 U.S.C. § 604(c).

In October 1996, California submitted its welfare plan to the Department of Health and Human Services, including a durational residency limitation consistent with § 604(c). On February 28, 1997, in All-County Letter 97-11, the California Department of Social Services instructed the counties to implement § 11450.03 as of April 1, 1997.

[4] The district court certified the class of plaintiffs defined as "all present and future AFDC and TANF applicants and recipients who have applied or will apply for AFDC or TANF benefits on or after April 1, 1997, and who will be denied full benefits because they have not resided in California for twelve consecutive months immediately preceding their application for aid."

Finding that the plaintiffs demonstrated the possibility of irreparable harm and that California would not be unduly harmed, the district court on June 4, 1997, granted the preliminary injunction, citing its prior reasoning in *Green v. Anderson* regarding the probability of success on the merits. *Roe v. Anderson*, 966 F. Supp. 977 (E.D. Cal. 1997).

2.

In granting the preliminary injunction in the instant case, the district court adopted by reference its prior discussion in *Green v. Anderson* of the Supreme Court's cases regarding the right of migration and equal protection, in which the Court set aside as unconstitutional distinctions drawn among residents of a state – all of whom are bona fide residents – based on the incipiency or duration of their residency.

California challenges the district court's reliance on its earlier decision in *Green*. Although the decision in *Green* was summarily affirmed by this court, *see* 26 F.3d 95, 96 (9th Cir. 1994), that judgment is not binding precedent because the Supreme Court ultimately vacated it as unripe. *See Anderson v. Green*, 513 U.S. 557, 559-60 (1995). California further suggests that the analysis in *Green* is outdated because of the subsequent enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), 42 U.S.C. §§ 601 et seq., which authorizes durational residency requirements as part of a broad-based federal legislative welfare reform effort.

However, our prior affirmance of the district court's decision in *Green* remains viable as persuasive authority, notwithstanding the Supreme Court's vacatur. *See In re Taffi*, 68 F.3d 306, 310 (9th Cir. 1995) (following as persuasive authority a decision vacated by the Supreme Court on other grounds); *Orhorhaghe v. INS*, 38 F.3d 488, 493 n.4 (9th Cir. 1994) (following as persuasive authority a decision vacated by the Supreme Court as moot). Moreover, the passage of the PRWORA does not affect the constitutional analysis of § 11450.03 because, as the Supreme Court has explained, "Congress may not authorize the States to violate the Equal Protection Clause." *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969).

3.

In finding that Roe and Doe had demonstrated a probability of success on the merits, the district court determined that the apparent purpose of § 11450.03 was to deter migration of poor people to California. The district court noted in *Green* that California's "two-tier system" for AFDC benefits implicates the constitutional right to freedom of travel or migration,[5] which " 'protects not only physical movement, and forbids direct restraints on interstate migration, but also protects residents of a State from being disadvantaged, or from being treated

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[5] While acknowledging that "the right to travel is not protected by explicit provision in the Constitution," the district court noted that "the Supreme Court repeatedly has held that such a right inheres in the concept of a union." 811 F. Supp. at 518; *see also id.* at 518 n.7 (string cite).

differently, simply because of the timing of their migration, from other similarly situated residents.' " *Green*, 811 F. Supp. at 518 (quoting *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 905 (1986)). At oral argument before this court, in response to the suggestion that the purpose of § 11450.03 is to keep poor people out of the state, the state conceded that it does not want people to move to California "with a mind-set of economic dependency."

We are thus satisfied, based upon the persuasive authority of our prior affirmance in *Green v. Anderson* and the apparent purpose of § 11450.03, that the district court did not err in its determination that Roe and Doe demonstrated a probability of success on the merits.

B.

"Numerous cases have held that reductions in AFDC benefits, even reductions of a relatively small magnitude, impose irreparable harm on recipient families." *Beno v. Shalala*, 30 F.3d 1057, 1063-64 n.10 (9th Cir. 1994) (string cite). The district court specifically found that the two "named" plaintiffs demonstrated that they faced the possibility of irreparable harm if the injunction were not issued because they both "have been unable to locate housing in California that they could afford on the reduced grant. Others within the class may face lower benefit levels depending on the state of prior residence." 966 F. Supp. at 985.

Nevertheless, California argues that, because the AFDC grant for new California residents "remains the same as it was in their state of prior residence . . . they

suffer no harm cognizable by this Court." As such, California suggests that the proper comparison is between the "position of newcomers before and after travel to California," rather than between "recent arrivals" and "longer-term California residents."

However, as noted by the district court, in case after case the Supreme Court has determined that the appropriate comparison is between the treatment of recent residents of California and other residents of California and not a comparison of recent residents of California to residents of other states. *See Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 904 (1986) (holding that the State may not treat new residents differently, "because of the timing of their migration, from other similarly situated residents"); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623 (1985) ("The State may not favor established residents over new residents."); *Zobel v. Williams*, 457 U.S. 55, 58-59 (1982) (comparing positions of new and older Alaska residents in receiving a bounty from oil revenues). The district court did not err in finding that plaintiffs faced the possibility of irreparable harm. California does not argue on appeal that it would be unduly harmed by the preliminary injunction.

II.

Balancing the probability of success on the merits with the possibility of irreparable harm, we hold that the district court did not abuse its discretion in granting the preliminary injunction. Our prior affirmance in *Green* remains persuasive as to the probability of success on the merits, and as to the possibility that irreparable harm

falls on the class Roe and Doe represent, but not on California.

An appeal from the grant or denial of a permanent, rather than preliminary, injunction would entitle the parties to a full review on the merits. We reject California's invitation to engage in such a review of this case in its current posture, before the district court has had a chance to address the underlying merits upon a fully developed record.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRENDA ROE and ANNA DOE, on behalf of themselves and all other similarly situated, Plaintiffs, v. ELOISE ANDERSON, Director of the California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; CRAIG BROWN, Director of the California Department of Finance, Defendants.	No. CIV-S-97-0529 DFL MEMORANDUM OF OPINION AND ORDER (Filed Jun. 4, 1997)

This case again presents the question of the constitutionality of a one-year durational residency requirement for full welfare benefits. A California statute, enacted in 1992, provides that "families that have resided in this state for less than 12 months" and who qualify for welfare shall receive benefits no greater than the "maximum aid payment that would have been received by that family from the state of prior residence." Cal. Welf. & Inst. Code § 11450.03.[1] Under this provision, California

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[1] Section 11450.03 of the Welfare and Institutions Code provides:

residents who have migrated to California from states that provide a lower level of benefits than California would receive that lower level of benefits through the first year of their residency in California. The State first sought to implement this residency limitation in 1992. At that time, the court found that such a distinction among California residents, based on the duration of their residency, was unconstitutional under a line of Supreme Court cases addressing durational residency provisions in a variety of contexts. *See Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993), *aff'd*, 26 F.3d 95 (9th Cir. 1994), *vacated as unripe sub nom Anderson v. Green*, 513 U.S. 557, 115 S. Ct. 1059 (1995). Because the controlling legal principles and precedents

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(a) Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.

(b) This section shall not become operative until the date of approval by the United States Secretary of Health and Human Services necessary to implement the provisions of this section so as to ensure the continued compliance of the state plan for the following:

(1) Title IV of the federal Social Security Act (Subchapter 4 (commencing with Section 601) of Chapter 7 of Title 42 of the United States Code.)
(2) Title IX [sic] of the federal Social Security Act (Subchapter 19 (commencing with section 1396) of Chapter 7 of Title 42 of the United States Code.)

have remained unchanged, the court reaches the same conclusion and again finds that § 11450.03 makes an unconstitutional distinction between California residents based on the length of their residency.

I.

Section 11450.03 was enacted in 1992 in conjunction with a California experimental work incentive project under the Aid to Families with Dependent Children ("AFDC") program. Section 11450.03 is only effective upon approval by the Secretary of Health and Human Services. Approval was given by the Secretary, in the form of a waiver, in October 1992.[2] The court entered an injunction prohibiting implementation of § 11450.03 on January 28, 1993. *Green*, 811 F. Supp. at 523. Subsequently, in a parallel litigation that challenged the Secretary's grant of waivers needed for the California welfare experiment – including the waiver for the durational residency limitation – the Court of Appeals vacated the Secretary's waivers. *See Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994). By its own terms, § 11450.03 then ceased to apply in the absence of approval by the Secretary. Accordingly, having granted California's petition for certiorari in *Green v. Anderson*, the Supreme Court found that the constitutionality of § 11450.03 no longer presented a justiciable controversy. *Green v. Anderson*, 513 U.S. 557, ___, 115 S. Ct. 1059, 1060 (1995).

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[2] The waiver authority, dated October 29, 1992, states that the Secretary waives the requirements in 42 U.S.C. § 602(a) and "various provisions of the regulations at 45 CFR 233.20(a)(1) and (2)." Pls.' Ex. 2 at 9.

In February 1996, the Secretary again granted the necessary waivers for the California welfare experiment with the exception of the waiver permitting the State to distinguish between old and new residents. The Secretary expressly declined to renew this waiver,[3] and without the waiver § 11450.03 was a dead letter. There the matter stood until August 1996 when Congress enacted a new federal welfare law, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), 42 U.S.C. §§ 601, et seq. The PRWORA significantly increased the states' discretion to design their federally supported welfare plans without seeking waivers from the Secretary. The Act superseded the AFDC program with a new program entitled Temporary Assistance to

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[3] The Secretary's refusal to grant a waiver for a residency requirement reflected her view that a two-tier benefits system was unconstitutional. Plaintiffs in this action have submitted a copy of the Secretary's brief filed May 17, 1995, in *V.C. v. Whitburn*, Civil Action No. 94-C-1028, an action brought in the United States District Court for the Eastern District of Wisconsin. Schwartz Decl. Ex. A. The Wisconsin AFDC demonstration project at issue applied to four counties only, for the first six months of a new arrival's residency in those counties, and would pay AFDC benefits at the level of the new resident's state of prior residence whether or not that level was higher or lower than the otherwise applicable Wisconsin level AFDC benefits. In her brief, the Secretary took the position that the Wisconsin project was unconstitutional under existing Supreme Court precedent. Nonetheless, the Secretary stated that she would continue the waiver previously granted to Wisconsin so that Supreme Court review would not be prevented as it had been in *Green*.

Needy Families ("TANF").[4] The Act specifically authorized the states to apply a one-year durational residency requirement of the kind embodied in Cal. Welf. & Inst. Code § 11450.03. *See* 42 U.S.C. § 604(c).[5] In October 1996 the State of California submitted its TANF plan to the United States Department of Health and Human Services. The plan included a durational residency limitation consistent with California law and § 604(c). On February 28, 1997, in All-County Letter 97-11, the California Department of Social Services instructed the counties to implement § 11450.03 as of April 1, 1997. Pls.' Ex. 3.

The implementation instructions in the All-County Letter explain that to be eligible for AFDC at the California computed grant amount, one member of the "assistance unit" must have resided in California for twelve consecutive months. *Id.* at 25. Thus, even if family members had lived in California all of their lives, but left the State "on January 29th, intending to reside in another state, and returned on April 15th," the family would receive AFDC at the level of the state of residence from January 29 to April 15, if that level were lower than the

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[4] Although there has been a change of terminology in federal law, the State continues to refer to the relevant benefits for needy families as "AFDC" benefits.

[5] The PRWORA provides:

> A State operating a program funded under this part may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months.

42 U.S.C. § 604(c) (Supp. 1997).

benefits that California would otherwise provide to the family. *Id.* at 30. Similarly, if "children from another state move in with an unaided caretaker relative who is a California resident," the level of benefits of the children's state of prior residence would determine their benefits for the first year of their residence in California.[6] *Id.* Nor would the birth of a newborn be treated differently because "neither the newborn nor any other member of the [assistance unit] has lived in California for 12 consecutive months." *Id.* at 32. In the computation examples, the instructions use a family of two – mother and one child – who move to California from Arizona. In California, region 1, the AFDC payment would be $456 a month compared to the Arizona payment of $275. Until the family has resided in California for twelve consecutive months, the family will receive AFDC benefits of $275. *Id.* at 33. And this lower amount will be the benefit level for the first year of residency whether or not the family actually was on welfare in the state of prior residence; the instructions note that "[i]t does not matter if a family was on aid in the former state." *Id.* at 30. On the other hand, the instructions explain that the residency requirement does not apply to families who have moved to California from another country because such countries would not have an AFDC program on which to base a comparison of benefit levels. Thus, a new state resident from one of the fifty states could receive a lower benefit than a new resident from a foreign country.

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[6] The instructions suggest that the unaided caretaker relative might be able to avoid this outcome by requesting aid for him or herself, thus creating a new assistance unit to which the children could be added. *See id.* at 31.

This action was filed on April 1, 1997, by plaintiffs Brenda Roe and Anna Doe. Brenda Roe was a resident of Oklahoma until early 1997. When her husband lost her job, the Roes decided to move to California to pursue employment. Ms. Roe was six months pregnant as of April 8, 1997. Ms. Roe states that because of complications that developed in her pregnancy after their move to California, Mr. Roe cannot leave her unattended and therefore cannot work. Ms. Roe was informed by the State social services office that she would be limited to the Oklahoma monthly grant level of $307 when she became eligible for AFDC at the six-month point of her pregnancy as compared to the California grant level of $565. According to Ms. Roe, the monthly rents in the community in which they now reside, Long Beach, California, are $300 for a studio apartment and $450 to $650 for a one-bedroom apartment. Ms. Roe avers that at the time she and her husband decided to move to California she did not know anything about AFDC or TANF and had never been on welfare.

Anna Doe recently moved to Los Angeles County from Washington, D.C. At the time of her move she was pregnant. She states that she came to California to look for a better job. According to her declaration, she obtained a job when she first arrived in California but later stopped working because she found the job too stressful. She has been living in a shelter. She became eligible for AFDC in April 1997 at the six-month point of her pregnancy. Under the two-tier system, her grant would be limited to $330 per month, the Washington, D.C. level as opposed to $456 per month, the California AFDC benefit for a single parent residing in Los Angeles

County. According to Ms. Doe, the rents for apartments in her area range from $450 to $570 a month.

On April 1, 1997, a temporary restraining order was entered by the court enjoining implementation of § 11450.03.[7] The parties stipulated that the temporary restraining order would remain in effect until resolution of plaintiffs' motion for preliminary injunction. On April 23, 1997, on the stipulation of the parties, the court permitted the action to be maintained as a class action and certified a class of plaintiffs defined as "all present and future AFDC and TANF applicants and recipients who have applied or will apply for AFDC or TANF on or after April 1, 1997, and who will be denied full California AFDC or TANF benefits because they have not resided in California for twelve consecutive months immediately preceding their application for aid." Plaintiffs now move for a preliminary injunction prohibiting defendants from implementing the durational residency requirement in § 11450.03.[8]

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[7] The temporary restraining order was issued by the Honorable Lawrence K. Karlton. Judge Karlton also granted plaintiffs' motion to proceed under fictitious names.

[8] On April 15, 1997, the court certified to the United States Attorney General that plaintiffs in this action have drawn into question the constitutionality of § 404(c) of Title IV of the Social Security Act as added by § 103 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2214 and codified at 42 U.S.C. § 604(c). The United States was permitted the opportunity to file an amicus brief but did not do so nor did it seek to intervene. Defendants' contention that the United States is an indispensable party is without merit. Section 604(c) permits, but does not require, the states to include a durational residency

II.

Plaintiffs make a number of factual contentions about the effect of § 11450.03 and the characteristics of the population of new residents that are relevant to their motion. As to the effect of § 11450.03, plaintiffs' exhibits demonstrate that the disparity between the California level and the level of the other forty-nine states will vary a good deal depending on the state of prior residence. For example, a four-member family in Los Angeles would receive a monthly AFDC benefit of $673, but if the family recently moved from Mississippi – which provides the lowest benefit level for a family of four of all of the states – the monthly benefit would be limited to $144. The cost of living in the various states may also affect a comparison of the relative benefit levels. According to the declaration of Robert Greenstein,[9] filed by plaintiffs, when housing costs are factored in, California benefit payments rank 18th in the nation. Greenstein Decl. ¶ 28; tbl. 1. Thus, although in absolute terms California benefit levels rank as the sixth highest grant level in the United States, *see id.* ¶ 29, Mr. Greenstein concludes that "[b]ecause

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requirement in their state plans. The durational residency provision challenged here is imposed by State, not federal, law. *See Shapiro v. Thompson*, 394 U.S. 618, 641 (1969) (finding that a federal provision prohibiting Secretary from approving a state welfare plan that included a residency requirement of more than one year not at issue in challenge brought against state residency requirements).

[9] Mr. Greenstein is Executive Director of the Center on Budget and Policy Priorities in Washington, D.C., and is the past administrator of the federal Food and Nutrition Service. Greenstein Decl. ¶¶ 1,2.

California's housing costs are high relative to most states and because welfare families in California are less likely than welfare families in any other state[ ] to live in subsidized housing, the residency requirement will place many recently arrived welfare families on an inferior footing relative to welfare families in the state from which the newcomers moved."[10] *Id.* ¶ 29.

Finally, on the question of the disparity between the AFDC grants of new and old California residents, plaintiffs offer that the disparity likely will increase under the PRWORA. The new welfare legislation permits the states to use federal funds for purposes other than cash assistance, such as to create new programs or to provide assistance not in the form of a cash grant. Thus, states may reduce their cash grants, while increasing other services, but it would be the lower cash grant that California would look to in calculating benefits for the first year of residency in California. Furthermore, because the new federal law eliminates the requirement that the states maintain a single

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[10] According to plaintiffs, expert:

> In all but two of the 45 states (including the District of Columbia as a state) in which welfare benefits are lower than in California, the average statewide costs of modest housing also are lower than in California. This means that newly entered residents from 43 of these 45 states typically will face higher costs of living, but they will not receive welfare benefits that reflect or adjust for those higher costs. . . . In fact, there are 15 states in which the maximum AFDC benefit for a family [of] three was less than half the Fair Market Rent for even a one-bedroom apartment in California.

Id. ¶¶ 29, 30.

statewide system, plaintiffs predict that in some of the states benefit levels may vary from county to county, increasing the possible variation and disparity.[11]

As to the characteristics of the population of new residents, plaintiffs make the case that persons do not move from state to state to seek higher AFDC benefits. According to the declaration of Professor Joel F. Handler,[12] the "welfare magnet" hypothesis is incorrect. Indeed, Professor Handler suggests that "non-AFDC-eligible people were more likely to move to higher benefit states than AFDC-eligible people . . . – exactly the opposite of the correlation that would be predicted by a 'welfare magnet' effect."[13] Handler Decl. ¶ 10. Professor

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[11] Plaintiffs also contend that the lack of uniformity under the new welfare law will make monitoring other states' programs untenable and will lead to mistakes. *See id.* ¶¶ 17-22.

[12] Professor Handler is the Richard C. Maxwell Professor of Law at UCLA Law School and UCLA School of Public Policy and Social Research. Handler Decl. ¶ 1.

[13] As to the welfare magnet hypothesis, Professor Handler states:

> An important study (Levine and Zimmerman, 1996) of the alleged "welfare magnet" hypothesis found a distinct absence of empirical support for the proposition that AFDC recipients tend to move from lower to higher benefit states, or to remain in higher benefit states. . . . The study found that only 3.8 percent of the AFDC-eligible population moved from one state to another, and only 1.8 percent moved from a state offering lower to a state offer[ing] higher AFDC benefits. In contrast, out of AFDC non-eligible people, 6.8 percent moved to a different state, 3.4 percent from a lower to a higher benefit state.

Id. ¶ 10.

Handler also states "that less than half of the AFDC-eligible population that moved to a higher-benefit state actually went on welfare within the first two years of their move." *Id.* Plaintiffs also submit the declaration Professor John Hartman.[14] Professor Hartman undertakes a review of the relevant statistical studies and performs his own analysis of the data he considers most reliable. Professor Hartman concludes that "welfare benefits appear to exert *no impact* on the residential choices made by poor people. And, when the indigent relocate, they have *no greater propensity* to consume welfare benefits than the poor who are already within a state's borders."[15] Hartman Decl. ¶ 49 (emphasis in original).

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[14] Professor Hartman is an Assistant Professor of Sociology at Columbia University who specializes in social science statistics. Hartman Decl. ¶ 1.

[15] Plaintiffs also offer Mr. Greenstein's opinion that many families "move with no expectation of receiving welfare benefits." Greenstein Decl. ¶ 6. Mr. Greenstein bases this opinion on data showing that less than half, 42 percent, of recently arrived California AFDC recipients, for whom there is data, had received welfare benefits in the state of their former residence. *Id.*

Professor Hartman's finding that the poor who migrate to a state are no more likely to go on welfare than the poor who are longer term residents would be important were the court to apply the Privileges and Immunities Clause of Article IV, under the approach suggested by Justice O'Connor in her concurring opinion in *Zobel v. Williams*, 457 U.S. 55, 71-81 (1982) (O'Connor, J., concurring). Under this approach, the constitutionality of a provision depends in part on whether non-citizens "constitute a peculiar source of the evil at which the statute is aimed" *Id.* at 76 (citation omitted).

Although not taking direct issue with most of plaintiffs' factual contentions, defendants provide a number of qualifications. On the question of disparity in benefits, defendants note that the lower benefit level that new residents experience may be offset in part by supplementary benefit programs, such as homeless assistance, that California provides to the needy without respect to the length of their residency. In addition, new residents would receive full Medicaid benefits and food stamps and in fact would receive an additional dollar of food stamp benefits for every three dollars of reduction in their AFDC grant. Wagstaff Decl. ¶ 8. Notwithstanding these additional ameliorating facts, defendants do not disagree with plaintiffs' contention that there will be disparities, even significant disparities, among California AFDC recipients as between newcomers and recipients who have resided in the state for one year. Indeed, defendants could hardly argue otherwise given defendants' position that the overriding purpose of § 11450.03 is to limit California's welfare expenditures. Defs.' Opp. at 25.

On the question of the "welfare magnet" hypothesis, defendants submit no declarations but briefly discuss a study published by the Brookings Institution that concludes that the poor do move to states with higher benefit levels. This study is criticized by Professor Hartman and the critique is a telling one that goes unanswered. Although defendants do not concede that the "welfare magnet" hypothesis is invalid, it is apparent from their pleadings that defendants do not view the hypothesis as critical to the constitutionality of the residency requirement. Rather, defendants' argument is a straightforward one that does not depend on empirical support: the State

of California spends an enormous sum of money each year on AFDC, some $2.9 billion; the State has the right and the duty to control the expense of the AFDC program in any way that it can; § 11450.03 by reducing the payments to new residents will save the State some $10.9 million in the 1997-1998 fiscal year and therefore is an appropriate exercise of State budgetary authority so long as the residency requirement does not amount to a penalty on migration under *Shapiro v. Thompson*, 394 U.S. 618 (1969), and the cases following *Shapiro*. The State defendants contend that § 11450.03 is not unconstitutional under *Shapiro* because new residents receive the same level of cash benefits as they would have received in the state of their prior residency.

III.

In *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1990), the court previously reviewed the relevant Supreme Court case law and concluded that the two-tier system under § 11450.03 was unconstitutional. In a subsequent case presenting much the same issue, the Supreme Court of Minnesota reached the same conclusion as to a similar provision in Minnesota law. *See Mitchell v. Steffen*, 504 N.W.2d 198 (1993), *cert. denied*, 510 U.S. 1081 (1994). There have been no developments in the case law that would question the analysis in *Green* or *Mitchell*.[16] The court will

[16] In an article reviewing the case law concerning state distinctions based on the duration or onset of residency, Professor William Cohen of the Stanford Law School notes that as to the dispute presented in this case, the make up of the Supreme Court has changed since its last decision in *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986) such that "[i]t is less than clear with whom the Supreme Court, as presently constituted, will agree." William Cohen, *Discrimination Against New State Citizens: An Update*, 11 Const. Commentary 73, 78 (1994). However accurate this observation, it is not proper for a lower court to attempt to anticipate new developments or refinements in the Supreme Court's approach to an area based on a change in the make up of the Court. Professor Cohen also suggests that "[t]hese should be easy cases." *Id.* In Professor Cohen's view, under the Citizenship Clause of the Fourteenth Amendment, "it is unconstitutional to deny benefits to new citizens that are extended to other citizens similarly situated – subject only to reasonable assurances that claims of new residence are bona fide." *Id.* at 79.

not repeat but now adopts its discussion in *Green* of the Supreme Court's right of migration and equal protection cases in which the Court set aside as unconstitutional distinctions drawn among residents of a state – all of whom are bona fide residents – based on the incipiency or duration of their residency. As the Supreme Court stated in *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 904 (1986), the right of migration "protects residents of a State from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from other similarly situated residents." The Supreme Court has found such distinctions invalid in the context of welfare benefits, *Shapiro v. Thompson*, 394 U.S. 618 (1969), nonemergency medical care, *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974), the right to vote, *Dunn v. Blumstein*, 405 U.S 330 (1972), rebates from state oil revenues, *Zobel v. Williams*, 457 U.S. 55 (1982), and veteran preferences, *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) and *Attorney General of New York v.*

Soto-Lopez, 476 U.S. 898 (1986). *See also Williams v. Vermont*, 472 U.S. 14 (1985) (tax credits). The Court has only upheld such distinctions where there was a genuine question as to whether the new residents were bona fide residents of the State, a concern that is not present in this case. *See Sosna v. Iowa*, 419 U.S. 393 (1975) (divorce); *Starns v. Malkerson*, 401 U.S. 985 (1971), *summarily aff'g* 326 F. Supp. 234 (Minn. 1970) (three-judge court) (in-state tuition).

The central analytical dispute here is whether the appropriate comparison is between new residents of California and the residents of their former states or between new residents and other longer term residents of California. The State defendants argue that so long as the benefit provided to new residents of California is the same as that provided to residents of their former states, there is no penalty on migration and no violation of equal protection.[17] Plaintiffs contend that the appropriate comparison

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[17] There is a logical inconsistency between defendants' argument and the structure of § 11450.03. Unlike the two-tier Wisconsin project described in note 3 *supra*, § 11450.03 only provides the same benefit level as the state of prior residency if that level is below that of California. Thus, if the new resident comes from a state with a more generous benefit, the resident will not receive the same treatment as in the state of prior residents [sic]. At oral argument, counsel for defendants argued that it would make little sense for the State to ever pay more to new residents, than to longer term residents, since the whole purpose is to save money.

The State defendants do not contend that there is anything about welfare that uniquely would justify a distinction between old and new residents. At oral argument counsel acknowledged that under the defendants' analytical approach, any State

is among California residents, some of whom are new arrivals and others of whom have been in the State for a longer period, and that no significant distinctions can be drawn among bona fide residents based on the length or onset of their residency in California.

The Supreme Court has resolved the question of which groups to compare. In case after case, the Court has determined that the appropriate comparison is among recent residents to California and other residents of California and not to residents of other states.[18] The Court explained in *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623 (1985), that "[t]he State may not favor established residents over new residents" and in *Soto-Lopez* that the State may not treat new residents differently, "because of the timing of their migration, from other similarly situated residents." *Soto-Lopez*, 476 U.S. at 904. Moreover, the decision in *Zobel v. Williams*, 457 U.S. 55 (1982), rests entirely on a comparison of new and older

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service, benefit or, indeed, tax or other imposition, keyed to the level of the new resident's former state would be constitutional. Thus, for example, a state could assess new residents at the higher tax rate of the state of their former residence. *But cf. Zobel v. Williams*, 457 U.S. 55, 58 n. 2 (1982) (noting that the Alaska Supreme Court had set aside under the Alaska Constitution's equal protection clause a provision giving tax exemptions to residents based on the length of their residency in the State).

[18] *See Mitchell v. Steffen*, 504 N.W.2d 198, 201-202 (1993) ("The United States Supreme Court has ruled that the comparison, in our case, is to be made between recent residents to Minnesota and other Minnesota residents, not between recent Minnesota residents and residents of other states. The Court has made this abundantly clear."), *cert. denied*, 510 U.S. 1081 (1994).

Alaska residents, each of whom received a bounty from oil revenues that no other state provided to its residents.

The court acknowledges that the states have broad latitude to design benefit programs. Moreover, both the Congress and the State of California, and several other states, consider that it is an appropriate cost saving measure to limit the benefits of new residents to those they would have received in the state of their prior residence. Facing a similar congressional permission in *Shapiro*, however, the Supreme Court held that "Congress may not authorize the States to violate the Equal Protection Clause." 394 U.S. at 641. In light of established Supreme Court precedent, the distinction drawn by § 11450.03 between new and old residents of California must be found unconstitutional.

IV.

Plaintiffs demonstrate that they face the possibility of irreparable injury if the injunction is not issued.[19] Both of the named plaintiffs have been unable to locate housing in California that they could afford on the reduced grant. Others within the class may face lower benefit levels depending on the state of their prior residence. Although

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[19] A party requesting a preliminary injunction must show either a likelihood of success on the merits and the possibility of irreparable injury or that serious questions on the merits are presented and the balance of hardships tips sharply in the party's favor. *Johnson Controls, Inc. v. Phoenix Control Systems, Inc.*, 886 F.2d 1173, 1174 (9th Cir. 1989). The court employs a sliding scale that takes account of the strength of plaintiff's showing on the merits and on injury.

any disruption to a State program is of concern, the record as it now stands does not suggest that the State will be unduly harmed by the issuance of an injunction. The record does not support a finding that there will be an influx of poor persons to California because of California's benefit levels. Moreover, the State may save a comparable amount of money by a very minor reduction in the benefits paid to all AFDC recipients.[20]

Plaintiffs' motion for preliminary injunction is therefore granted. The court orders:

Pending judgment in this action, defendants and their agents, assignees, and successors in interest are enjoined from implementing: 1) Section 11450.03(a) of the California Welfare and Institutions Code; 2) regulations promulgated pursuant to § 11450.03(a) of the California Welfare and Institutions Code, including but not limited to M.P.P. E.A.S. § 89-110.4; and 3) All-County Letter ("ACL") 97-11 to the extent that the ACL denies standard California AFDC or TANF benefits to members of the plaintiff class or determines any AFDC or TANF benefits in whole or in part by reference to the AFDC or TANF grant of any other state or territory.

IT IS SO ORDERED.

Dated: 2 June 1997.

/s/ David F. Levi
DAVID F. LEVI
United States District Judge

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[20] At oral argument, plaintiffs' counsel stated that a reduction of some 36 cents a month would produce a yearly aggregate saving of $10 million.

DECLARATION OF SERVICE

Case Name: **ROE v. ANDERSON, et al.**

USDC, Eastern District of Cal. Case No.: CIV-S-97-0529 DFJ/JFM

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On *July 2, 1997,* I placed the attached

CIVIL APPEALS DOCKETING STATEMENT

in the internal mail collection system at the Office of the Attorney General, 1300 I Street, P.O. Box 944255, Sacramento, California, 94244-2550, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage fully postpaid, addressed as follows:

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I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on July 2, 1997, at Sacramento, California.

/s/ Diane Boggess
Diane Boggess

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees, v. ELOISE ANDERSON, Director of the California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; CRAIG BROWN, Director of the California Department of Finance, Defendants-Appellants.	No. 97-16326 D.C. No. CIV-S-97-0559 DFL/JFM ORDER (Filed Apr. 10, 1998)

Before: FLETCHER and T.G. NELSON, Circuit Judges, and WHALEY,* District Judge.

The petition for rehearing is denied.

* Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated, Plaintiffs, v. ELOISE ANDERSON, Director of the California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; CRAIG BROWN, Director of the California Department of Finance, Defendants.	No. CIV-S-97-0529 DFL/JFM DECLARATION OF BRUCE WAGSTAFF IN OPPOSITION TO REQUEST FOR PRELIMINARY INJUNCTION Date: May 16, 1997 Time: 9:00 a.m. Courtroom 3, The Honorable David F. Levi (Original Filed Apr. 16, 1997)

DECLARATION

I, BRUCE WAGSTAFF, declare that:

1. I am Deputy Director of the Welfare Programs Division of the California Department of Social Services (CDSS). The Division administers the Aid to Families with Dependent Children (AFDC) Program and other welfare programs. Although California's AFDC Program is now being funded under the new Temporary Assistance to Needy Families (TANF) federal law, California's program continues to be called AFDC. As Deputy Directory, I am responsible for supervising the implementation of federal and state laws and formulating state regulations setting administrative policy relative to welfare benefit payments for the AFDC program. As Deputy Director, I have personal knowledge of the following and could competently testify thereto if called as a witness.

2. AFDC is California's largest welfare program. In the most recent fiscal year for which actual expenditures are available (fiscal year 1995-1996), California provided AFDC to an average of 2,645,814 persons per month, at an annual cost of $6.0 billion dollars. Of that total amount, $2.9 billion dollars in funds were derived from the California state general fund.

3. Based on information provided by the United States Department of Health and Human Services for the fiscal year 1996-1997, California has the sixth highest grant level in the United States and the highest grant level of the 10 most populous states. California accounts for 29 percent of all money spent nationwide on the AFDC program, and 20 percent of the national AFDC

caseload, though it has only 12 percent of the nation's population.

4. In a survey conducted by CDSS' Information Services Bureau in October 1995, of the then-existing AFDC caseload, approximately 9100 families resided in another State within one year of application of AFDC benefits in California.

5. California's Welfare and Institutions Code Section 11450.03, designated as the Relocation family grant, was originally enacted in 1992 by the California State Legislature as part of an overall program of welfare reform designed both to save money and to end the cycle of dependency on welfare through changes to welfare program benefit structures.

6. For the 1997-1998 fiscal year, CDSS projects that implementation of Welfare and Institutions Code Section 11450.03 will reduce total AFDC expenditures by $22.8 million dollars. Of this total reduction, California general fund expenditures will be reduced by $10.9 million dollars.

7. California's Relocation Family Grant provision is authorized by the United States Congress in Section 103, Section 404(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 104-193. In addition to California, Pennsylvania and Maryland have also implemented residency-based grant provisions as part of their respective welfare reform programs. A number of other states have proposed implementing similar provisions in their TANF State Plans.

8. Under the California Family Relocation Grant provision, new residents will not be denied AFDC or other benefits. In fact, new residents in California will receive no less than the amount of aid they would have received in their state of prior residence. In addition, new residents may be eligible for supplementary benefits. For example, under current law, California pays the California Special Needs Allowance (SNA) for homeless assistance to all AFDC families who are entitled to it. Many other states do not have a SNA for homeless assistance. In California, SNA provides an eligible recipient up to $30 per day for temporary shelter and up to 160% of MAP for permanent housing. Additionally, all persons impacted by Welfare and Institutions Code Section 11450.03 are eligible for full Medicaid benefits and Food Stamps. In fact, for every three dollars an AFDC grant is reduced by operation of Welfare and Institutions Code Section 11450.03, Food Stamp benefits are increased by approximately one dollar.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on April 15, 1997, at Sacramento, California.

/s/ Bruce Wagstaff
BRUCE WAGSTAFF

DECLARATION OF SERVICE

Case Name: ROE V. ANDERSON, et al.

USDC, Eastern District of Cal. Case No.: CIV-S-97-0529 DFJ/JFM

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 16, 1997, I place the attached

DECLARATION OF BRUCE WAGSTAFF IN OPPOSITION TO REQUEST FOR PRELIMINARY INJUNCTION

in the internal mail collection system at the Office of the Attorney General, 1300 I Street, P.O. Box 944255, Sacramento, California, 94244-2550, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage fully postpaid, addressed as follows:

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I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on April 16, 1997, at Sacramento, California.

/s/ Diane Boggess
Diane Boggess

DANIEL E. LUNGREN, Attorney General
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Attorneys for Defendants Eloise Anderson, the California Department of Social Services, Pete Wilson, and Craig Brown

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated, Plaintiffs, v. ELOISE ANDERSON, Director of the California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; CRAIG BROWN, Director of the California Department of Finance, Defendants.	No. CIV-S-97-0529 DFL/ JFM DECLARATION OF THEODORE GARELIS IN OPPOSITION TO REQUEST FOR PRELIMINARY INJUNCTION Date: May 16, 1997 Time: 9:00 a.m. Courtroom 3, The Honorable David F. Levi (Filed Apr. 16, 1997)

I, THEODORE GARELIS, declare:

1. I am an attorney at law admitted to practice law in the State of California and in this Court. I am employed as a Deputy Attorney General with the Office of the California Attorney General. I have been assigned to represent defendants in this matter. I have personal knowledge of the facts set forth herein, and if called upon to testify, would and could competently do so.

2. I am also assigned to represent the state defendants in *Beno v. Shalala,* CIV-S-92-2135 DFL/JFM, and in *Green v. Anderson,* CIV-S-92-2118 DFL/JFM. I am thus a custodian of records of the copies of the legal files in these actions.

3. Attached as Exhibit A hereto is a true and correct copy of the Declaration of Dennis Hordyk, dated January 14, 1993. The original of this declaration is attached to defendants' memorandum of points and authorities in opposition to preliminary injunction in *Green v. Anderson,* CIV-S-92-2118 DFL/JFM.

4. Attached as Exhibits B, C, and D are copies of documents from the administrative record lodged with this Court by the United States in *Beno v. Shalala,* CIV-S-92-2135 DFL/JFM.

5. Exhibit B is a true and correct copy of the waiver authority attached to the October 29, 1992, letter to Eloise Anderson from the United States Department of Health and Human Services, approving California's application for a demonstration project. The federal statutes and regulations referenced in the waiver authority are those waived in 1992 by the United States as part of the

approval of the demonstration project. A copy of the original is in Volume I of the administrative record lodged with this Court in *Beno v. Shalala.*

6. Exhibit C is a true and correct copy of the February 29, 1996, letter to Eloise Anderson from the United States Department of Health and Human Services, noting in relevant part that the waiver authority for the durational residency requirement was revoked by the United States Department of Health and Human Services in 1996. A copy of the original is in Volume VII of the administrative record lodged with this Court in *Beno v. Shalala.*

7. Exhibit D is a true and correct copy of the March 11, 1996, letter to Kimberly Belshé from the United States Department of Health and Human Services, noted in relevant part that the waiver of the maintenance of effort requirement was reapproved in 1996. A copy of the original is in Volume VII of the administrative record lodged with this Court in *Beno v. Shalala.*

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was executed on April 15, 1997, at Sacramento, California.

/s/ Theodore Garelis
THEODORE GARELIS
Deputy Attorney General
Declarant

EXHIBIT A

DECLARATION OF DENNIS HORDYK

I, Dennis Hordyk, declare:

1. I am the Assistant Director of the Department of Finance. The Department has overall responsibility for compilation of the Governor's Budget for the State of California.

2. The AFDC program is funded from the state general fund revenues and federal funds, on a 50/50 match basis; the State pays 95 percent of the non-federal share of the AFDC program costs. In the 1992-93 budget, the state's General Fund revenues total approximately $40.9 billion.

3. For the fiscal year ending June 30, 1993, the Department of Finance is projecting a $2.1 billion *deficit* in the state's general fund. The budget deficit is so severe that the *state will have no reserve* available to cover the costs of unforeseen events.

4. The current 1993-94 budget plan resolves the $2.1 billion 1992-93 deficit during the 1993-94 fiscal year. The Department of Finance is projecting that revenues will actually decline by over $1 billion from 1992-93. This will be the second year of revenue declines as revenues declined from 1991-92 to 1992-93 by approximately $1.1 billion. This is a result of continuing poor performance in the economy. These revenue declines will require reductions to the 1993-94 fiscal year budget plan beyond those already taken in the 1992-93 budget and the current 1993-94 budget plan.

5. I understand the U.S. District Court has temporarily restrained implementation of Welfare and Institutions Code section 11450.03, as enacted by Chapter 722 of the Statutes of 1992. Failure to implement Section 11450.03 would result in additional, unbudgeted state General Fund costs in the AFDC program of $8.4 million in fiscal year 1992-93, and $22.5 million in fiscal year 1993-94.

6. There are no funds appropriated by the 1992-93 state budget to pay for this increase in expenditures in the AFDC program.

7. As indicated above, there are simply no available state general fund revenues to fund a supplemental or deficiency appropriation to meet this additional expense.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 14, 1993, at Sacramento, California.

/s/ Dennis Hordyk
DENNIS HORDYK

EXHIBIT B

DEPARTMENT OF HEALTH AND HUMAN SERVICES
ADMINISTRATION FOR CHILDREN AND FAMILIES
OFFICE OF FAMILY ASSISTANCE
WAIVER AUTHORITY

STATE: California

Waivers of the following provisions of the Social Security Act are provided for the purposes of implementing the Assistance Payments Demonstration Project:

Statewideness

402(a)(1) and various provisions of the regulations at 45 CFR 205.120(a) and 233.10(a)(1)(iv) – to allow the State to conduct the demonstration Statewide but to exclude control group cases from having various demonstration rules applied to them.

Thirty and One-Third Earnings Disregard

402(a) (8) (B) (ii) and various provisions of the regulations at 45 CFR 233.20(a) (11) (i) (D) and (ii) (B) – to allow the State to continue the $30 and one-third earned income disregard without regard to the 12-month and 4-month limitations.

100-Hour Rule

402(a) (41) and provisions of the regulations at 45 CFR 233.100(a) (1) (i) and (c) (1) (iii) – to allow the State to continue to provide AFDC benefits to unemployed parent recipient families in which the principal earner works 100

or more hours per month so long as the family meets all other rules for continuing eligibility.

California Relocation Grant

402(a) and various provisions of the regulations at 45 CFR 233.20(a) (1) and (2) – to allow the State to implement a different method for determining the amount of assistance for those families in the treatment group who have not resided in the State continuously for at least 12 months immediately prior to application. The different method provides an AFDC grant amount equal to the lesser of the amount of aid computed using California's grant computation or the maximum aid payment, not counting special needs, of the State of origin, as determined semi-annually by the State of California.

Cost-of-Living Adjustments

402(a) and various provisions of the regulations at 45 CFR 233.20(a) (1) and (2) – to allow the State to provide cost-of-living adjustments in the MAP and the MBSAC to the treatment group and not to the control group.

The following activity does not require waiver of provisions of the Social Security Act because the State will implement it through a State Plan amendment: Reducing the maximum aid payment (MAP) for all AFDC cases to 94.2 percent of the September 30, 1992, level.

The State may further reduce MAPs from 94.2 percent of the September 30, 1992, level for all AFDC cases by up to five percent based on a statutory change. The effective date of the change may be no earlier than the first day of

the quarter in which the State submits an approvable State plan amendment which specifies the amount of the reduction. Action will be taken by the Department on the amendment pursuant to 45 CFR Part 201.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
HEALTH CARE FINANCING ADMINISTRATION

WAIVER AUTHORITY

STATE: California

Waivers of the following provisions of the Social Security Act are provided:

1902(c) (1) – Maintenance of Effort. To permit the State to obtain approvals of new State plans for medical assistance even though the AFDC payment levels under WRDP will be below those levels in effect on May 1, 1988.

Under authority of section 1115(a) (2) of the Social Security Act, expenditures (which would otherwise not be regarded as expenditures under section 1903) shall for the duration of the demonstration be regarded as expenditures under the State's title XIX plan.

- Expenditures to permit the State to maintain the eligibility level for its Medically/Needy program at the levels in effect June 30, 1991, after the State reduces payments under APDP as designated under section 1903(f)(1).

EXHIBIT C

[LOGO] DEPARTMENT OF HEALTH & HUMAN SERVICES

ADMINISTRATION FOR CHILDREN AND FAMILIES
Office of the Assistant Secretary, Suite 600
370 L'Enfant Promenade, S.W.
Washington, D.C. 20447

February 29, 1996

Ms. Eloise Anderson
Director
California Department of Social Services
744 P Street
Sacramento, California 95814

Dear Ms. Anderson:

I am pleased to inform you that your application for waivers under section 1115 of the Social Security Act to amend the "Assistance Payments Demonstration Project" (APDP) is approved upon written acceptance of the enclosed Amendments to Waiver Terms and Conditions. The amendments to the demonstration will be effective beginning on the first day of the month following 50 days from the date the State accepts the Amendments to Waiver Terms and Conditions and will remain in effect until the end of the demonstration period specified in the project's Waiver Terms and Conditions.

The title IV-A waivers necessary to implement the demonstration are identified on the enclosed listing. A separate letter approving a waiver of section 1902(c)(1) of the Social Security Act will be forthcoming from the Health Care Financing Administration. In order to implement these terms and conditions, you should submit a title IV-

A AFDC State Plan amendment indicating the date that the proposed 2.3 percent reduction in payment levels will be implemented. Prior Plan amendments for a 1.3 percent reduction, implemented December 1, 1992, and a 2.7 percent reduction, implemented September 1, 1993, have previously been approved.

The Administration believes that the Federal Government must give states the flexibility to design new approaches to their local problems, provided that these proposals meet Federal standards. We believe California's demonstration will add to the information base for new policy directions for welfare reform.

If you have any questions regarding this approval, please contact Mr. Peter Germanis, the Federal Project Officer for this project. His address is: Administration for Children and Families, Office of Family Assistance, 370 L'Enfant Promenade, S.W., Washington, D.C. 20447; telephone (202) 401-9316.

I commend you and staff of the California Department of Social Services for seeking alternatives to improve the public assistance system and to assist families in becoming self-sufficient. I look forward to continuing to work with you and your agency on this important initiative.

Sincerely,

/s/ Mary Jo Bane
Mary Jo Bane
Assistant Secretary
for Children and Families

Enclosures

cc: Sharon Fujii
ACF Regional Administrator

February 1996

AMENDMENT TO WAIVER TERMS AND CONDITIONS FOR THE CALIFORNIA ASSISTANCE PAYMENTS DEMONSTRATION PROJECT

In the October 1992 Waiver Terms and Conditions for APDP, delete the third bullet under "AFDC" in 2.2 and add the following language to 2.3, beginning a new paragraph under the existing text:

> "These MAP reductions will not apply to any family in which all parents or caretaker relatives of the eligible child(ren) living in the home
>
> - receive benefits under the Supplemental Security Income/State Supplementary Program, In-Home Supportive Services (IHSS), Workers' Compensation Temporary Disability Insurance (TDI), or State Disability Insurance (SDI);
> - are non-needy non-parent caretaker relatives;
> - have been determined by the Department of Social Services, either in the course of the AFDC eligibility or JOBS exemption process or in response to a request from the individual for such a determination, to be incapacitated for employment; or
> - are high school students under the age of 19.
>
> A family that is not subject to the MAP reductions will receive the MAP that was in effect for that size family in August 1992."

DEPARTMENT OF HEALTH AND HUMAN SERVICES
ADMINISTRATION FOR CHILDREN AND FAMILIES

OFFICE OF FAMILY ASSISTANCE

Amendments to Waiver Authority

The Waiver Authority issued by the Administration for Children and Families in October 1992 for the purposes of implementing the Assistance Payments Demonstration Project are amended as follows:

- In the *"Statewideness"* waiver, add the following language immediately before the period:

  "and to exclude from the MAP reductions those cases specified in 2.3 of the Waiver Terms and Conditions"

- Delete the heading *"California Relocation Grant"* and the entire paragraph under that heading.

EXHIBIT D

[logo]
DEPARTMENT OF HEALTH & HUMAN SERVICES
Health Care Financing Administration

7500 SECURITY BOULEVARD
BALTIMORE MD 21244-1850

MAR 11 1996

Ms. Kimberly Belshe
Director
California Department of Health Services
714 P Street
Sacramento, California 95814

Dear Ms. Belshe:

As indicated in the award letter dated February 29 that the State received from the Administration for Children and Families (ACF), the Health Care Financing Administration (HCFA) has approved your application for a waiver to amend the welfare reform demonstration entitled "California Assistance Payment Demonstration Project" (APDP).

A waiver of the following provision of the Social Security Act is provided:

- Section 1902(c)(1) – Maintenance of Effort

  To permit the State to obtain approvals of new State plans for medical assistance even though the AFDC payment levels under APDP will be below those levels in effect on May 1, 1988.

The waiver will be effective beginning on the first day of the month following 50 days from the date the State

accepts the Amendments to Waiver Terms and Conditions. It will remain in effect until the end of the demonstration period specified in the project's current Waiver Terms and Conditions (i.e., through March 31, 1999). The project number for APDP will remain 11-W-00018/9.

Enclosed are:

> The HCFA waiver for this project (Enclosure I). The updated waiver list includes Costs Not Otherwise Matchable authority previously granted.
>
> The terms and conditions that define the nature, character, and extent of anticipated HCFA involvement in the project (Enclosure 2). These are in addition to the interagency terms and conditions you have received from ACF for this project.

Enclosure 1

DEPARTMENT OF HEALTH AND HUMAN SERVICES
HEALTH CARE FINANCING ADMINISTRATION

Waiver and Costs Not Otherwise Matchable for California Welfare Reform Demonstration

Waiver

The following waiver is granted to the State:

1902(c)(1) regarding Maintenance of Effort, to permit the State to obtain approvals of new State plans for medical

assistance even though the AFDC payment levels under APDP will be below those levels in effect on May 1, 1988.

Costs Not Otherwise Matchable

Under the authority of section 1115(a)(2) of the Social Security Act (the Act) the following expenditures made by the State for the costs identified below (which may not otherwise be included as State expenditures under section 1903) shall, for the duration of the project, be regarded as expenditures under the State's title XIX plan:

> Expenditures to permit the State to maintain the eligibility level for its Medically Needy program at 133 1/3 percent of the AFDC payment level in effect on November 30, 1992, as specified under section 1903(f)(1), while the State reduces payments under the demonstration.

This award is subject to our receiving your written acceptance of the HCFA terms and conditions within 30 days of the date of this letter.

Your HCFA project officer is Joan Peterson, who can be reached at (410) 786-0621. Your project officer is available to answer any Medicaid-related questions concerning the scope and implementation of the project described in the interagency terms and conditions.

Communications regarding program matters should be submitted to the project officer at the following address: Office of State Health Reform Demonstrations, Office of Research and Demonstrations, Health Care Financing Administration, Mail Stop C-3-18-26, 7500 Security Boulevard, Baltimore, Maryland 21244-1850.

Official correspondence concerning the project, including quarterly reports, should be submitted to Joanna Bandzwolek, Financial, Administrative and Procurement Staff, Office of Research and Demonstrations, Health Care Financing Administration, Mail Stop C-3-11-17, 7500 Security Boulevard, Baltimore, Maryland 21244-1850. She may be contacted for additional administrative matters at (410) 786-6643.

We extend our congratulations on this award and look forward to continuing to work with you during the course of the project.

Sincerely,

/s/ Barbara S. Cooper
Barbara S. Cooper
Acting Director
Office of Research
and Demonstrations

Enclosures

Enclosure 2

HEALTH CARE FINANCING ADMINISTRATION

SPECIAL TERMS AND CONDITIONS

NUMBER: 11-W-00018/9

TITLE: California Assistance Payments Demonstration Project

AWARDEE: California Department of Social Services

1. The awardee will submit to HCFA all deliverables indicated in the joint terms and conditions. Reports may be submitted according to the schedule prescribed by ACF.

2. HCFA may suspend or terminate the project, in whole or in part, at any time before the date of expiration, whenever it determines that the awardee has materially failed to comply with the terms of the project award. HCFA will promptly notify the awardee in writing of the determination and the reasons for the suspension or termination, together with the effective date.

3. HCFA reserves the right to withdraw waivers at any time, if it determines that continuing the waivers would no longer be in the public interest. If a waiver is withdrawn, HCFA will be liable for only normal close-out costs.

DECLARATION OF SERVICE

Case Name: **ROE v. ANDERSON, et al.**

USDC, Eastern District of Cal. Case No.: CIV-S-97-0529 DFJ/JFM

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On *April 16, 1997*, I placed the attached

DECLARATION OF THEODORE GARELIS IN OPPOSITION TO REQUEST FOR PRELIMINARY INJUNCTION

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Shiela M. Leiber
Dan Bensing
Attorneys, Department of Justice
901 "E" Street, N.W.
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Washington, D.C. 20530

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on April 16, 1997, at Sacramento, California.

/s/ Diane Boggess
Diane Boggess

No. 98-97

Supreme Court, U.S.
FILED
AUG 18 1998
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

ELOISE ANDERSON, Director of the California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; CRAIG BROWN, Director of the California Department of Finance,

Petitioners,

v.

BRENDA ROE AND ANNA DOE, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant review of the decisions below which, consistent with the decisions of all lower courts to consider the question and with this Court's longstanding precedents prohibiting discrimination based on length of residency, held unconstitutional a state statute that discriminates against bona fide state residents who have settled in the state within the past 12 months.

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I. INTRODUCTORY STATEMENT

The unconstitutionality of California's durational residency requirement does not raise a novel question, but is squarely dictated by this Court's long-settled precedent, which lower courts have uniformly applied to invalidate similar state laws. This Court has consistently recognized that state classifications treating one group of state residents less favorably than another, because of the disfavored group's recent migration from another state, violate equal protection and the right to travel. California's one-year durational residency requirement nevertheless ties the level of work-based public assistance to the length of residency, in an express effort to discourage migration from other states. As every lower court to consider the question has easily concluded, such a two-tiered scheme is plainly unconstitutional under this Court's durational residency jurisprudence.

The principle of free interstate migration stretches at least as far back as *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849), continuing through *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Zobel v. Williams*, 457 U.S. 55 (1982), to *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 905 (1986). Under this line of authority, bona fide residents of a state may not be subjected to less favorable treatment based on the length of time they have resided in that state. Petitioners do not argue for overruling of this authority – and quite properly so, since it has in no sense proven "unworkable" and there has been no "evolution of legal principle [which] has left [its] doctrinal footings weaker than they were. . . . " *Planned Parenthood v. Casey*, 505 U.S. 833, 855-57 (1992) (joint opinion of O'Connor, Kennedy and Souter, JJ.).

There is no substantial question as to the unconstitutionality of California's 12-month durational residency requirement under this Court's holdings. To the extent that Petitioners have previously argued that there is uncertainty over this question, any such uncertainty has dissipated in the three and one-half years since this Court vacated as unripe the predecessor to this case, *Anderson v. Green*, 513 U.S. 557 (1995). During that period, **every court** which has examined the constitutionality of like statutes has interpreted this Court's durational residency jurisprudence to prohibit their implementation. In all, at least ten separate courts, federal and state, have already enjoined just such laws – and California's statute is, if anything, the most constitutionally egregious of all. Notwithstanding this Court's repeated admonition that the aim of "inhibit[ing] the immigration of indigents" is "constitutionally impermissible," *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263-64 (1974), the expressly trumpeted purpose of California Welfare & Institutions Code § 11450.03 is to deter poor families from settling in California.

Nor, contrary to Petitioner's argument, is the issue of what standard of review should be applied of any significance at all. Whether applying strict scrutiny or rational basis review, all the lower courts have struck down two-tiered benefits schemes like the one at issue. Given the lower courts' uniform conclusion and the absence of any important constitutional question, the Petition should be denied.

II. STATEMENT OF THE CASE

A. THE CALIFORNIA STATUTE

The California durational residency statute, Welfare & Institutions Code § 11450.03, facially discriminates against newcomer residents by restricting their maximum CalWORKs assistance to the level of their prior state of residence.[1] Section 11450.03 is the same statutory provision invalidated in *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993), *aff'd*, 26 F.3d 95 (9th Cir. 1994), *vacated as unripe sub nom, Anderson v. Green*, 513 U.S. 557. The language of the statute mandates that eligible families who have resided in the state for less than twelve consecutive months immediately before applying cannot receive CalWORKs assistance any higher than "the maximum aid payment that would have been received by that family from the state of prior residence." Cal. Welf. & Inst. Code § 11450.03(a). Californians who have resided in the state for at least one year receive CalWORKs benefits at the level the State of California has deemed appropriate to

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[1] Throughout its petition, the State refers to the assistance program at issue as AFDC (Aid to Families with Dependent Children), although, as it correctly points out, the federal AFDC program was repealed and replaced with a new program named Temporary Assistance to Needy Families ("TANF"). *See* Pet., pp. 3-4 & nn. 1, 4. In California, the program adopted by the State legislature is titled CalWORKs. Cal. Welf. & Inst. Code § 11200 *et seq*. CalWORKs is a work-based program which requires participants to participate in work activities while receiving aid. Cal. Welf. & Inst. Code § 11320.1. It is also time-limited in that a participant is removed from assistance after receiving aid for a total of 60 months. Cal. Welf. & Inst. Code § 11320.15.

their subsistence requirements. On the other hand, Californians who have lived in the state for less than one year – even though no less bona fide California residents – are limited to the lesser assistance levels they would have received in Oklahoma, Mississippi, or whatever other state from which they moved, if that state's assistance levels were lower. Newcomer families from states with assistance levels **lower** than California's thus receive the lower amount of the states from which they came, while newcomer families from states with **higher** assistance levels receive benefits at the lower California levels. *Id.*

Under this rule, families that have migrated from other states within the past year will receive a small fraction – as little as 21% – of that received by otherwise identical families. For example, while the ordinary monthly grant for a family of four in California is $673, a family of four that has moved from Mississippi to California within the past year would receive only $144 per month – irrespective of whether the family could survive at that level in California, which has one of the highest costs of living in the United States. SER 19, 188, 205-09.[2]

Under the Ninth Circuit's decision in *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994), invalidating the waivers needed to implement the statute, the State of California had been prevented from implementing its two-tiered scheme. With the enactment of the 1996 federal welfare law, the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), state officials concluded

[2] References to the record are contained in the Supplemental Excerpts of Record ("SER"), which respondents filed with the Ninth Circuit.

that a waiver was no longer necessary, and decided to proceed once more with implementation of section 11450.03.[3] In February 1997, California directed counties to implement section 11450.03 effective April 1997. SER 7-10.

1. The Purpose of the Statute

As both the district court and court of appeals concluded: "[T]he apparent purpose of § 11450.03 was to deter migration of poor people to California." *Roe v. Anderson*, 134 F.3d 1400, 1404 (9th Cir. 1998). In striking down this provision, the district court cited its previous analysis, contained in *Green v. Anderson*, of California's "two-tier system under § 11450.3." *Roe v. Anderson*, 966 F. Supp. 977, 983 (E.D. Cal. 1997). In *Green*, the district court found ample evidentiary support for "the conclusion that the purpose of § 11450.03 was to deter migration of indigents." *Green*, 811 F. Supp. at 522 n.14. It also found that the legislative history of the statute confirmed the statute's plain text. *Id.* ("[S]uch a purpose is inherent in a two-tier benefit structure" that "affects only the benefits of new residents" rather than "cutting all recipients' benefits equally.")[4] The Ninth Circuit reached this same conclusion in *Beno v. Shalala*, noting that the residency

[3] PRWORA amended the Social Security Act, 42 U.S.C. § 601 *et seq.*, to replace AFDC with Temporary Assistance to Needy Families ("TANF") and requires each state to submit a TANF plan. *See supra* note 1.

[4] *See also Green*, 811 F. Supp. at 522-23 ("If the measure intends to deter settlement into the state of persons who need welfare and seek a higher benefit, it is sensibly designed but has an unconstitutional purpose. If the measure simply seeks to

requirement "aims to discourage poor families from moving to California by limiting recent entrants' AFDC benefits to the amount received in their state of former residence." 30 F.3d at 1061.

The statute had its origins in a ballot initiative first introduced by Governor Pete Wilson on December 10, 1991. The Governor campaigned publicly for the ballot initiative as a measure to keep poor people in need of welfare from coming to California. Literature encouraging voters to place the proposed initiative on the November 3, 1992 ballot described its objective as to "**STOP** out of state welfare recipients from moving to California just to increase their grants." SER 49 (emphasis in original).

Campaign materials favoring the measure, Proposition 165, proclaimed the same purpose. For example, a widely distributed "fact sheet" stated that the proposition "***LIMITS WELFARE PAYMENTS TO NEWCOMERS*** – To reduce any incentive to come to California solely for higher welfare benefits." SER 51 (emphasis in original). In the official ballot argument on behalf of the initiative, Governor Wilson articulated as the initiative's selling point that "people move to California to collect welfare," and that "[n]ew state residents would receive no more in

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save costs, defendants fail to explain why new residents are better able to bear a reduction in benefits than other residents. For the measure applies to those who were on welfare in the state of prior residence and those who were not, those who need welfare when they arrive in California and those who come to that need months thereafter. Stripped of the unconstitutional purpose of deterring migration, the measure lacks a rational design. This group of residents is no better able to bear the loss of benefits than a group randomly drawn.").

welfare here than in their home state, to end California's status as a welfare magnet." SER 64.

At the same time that the Governor sought voter approval for the initiative, he promoted legislation with the identical end. The State Legislative Analyst's report on the measure stated that "[t]he concern driving these policy proposals is that people receiving assistance in low-benefit states are encouraged to move to high-benefit states in order to take advantage of the higher benefit." SER 85.

The Secretary for the California Health and Welfare Agency requested then-required waivers from the federal government for both Proposition 165 and the companion legislation. SER 67. The waiver request letters for each expressly identified as the sole objective of the residency requirement "reduc[ing] the incentive for families to migrate to California for the purpose of obtaining higher aid payments." *Green*, 811 F. Supp. at 522 n.14. Although the ballot initiative was ultimately defeated at the polls, its legislative counterpart was adopted and signed by the Governor on September 14, 1992. 10 West's Cal. Leg. Serv. 2897 (1992).

As the court of appeals noted: "At oral argument before this court, in response to the suggestion that the purpose of § 11450.03 is to keep poor people out of the state, the state conceded that it does not want people to move to California 'with a mind-set of economic dependency.' " *Roe*, 134 F.3d at 1404. In the predecessor *Green* litigation, on the day the litigation was filed, Petitioner Eloise Anderson, Director of the California Department of Social Services, issued a news release pronouncing that

the measure aimed to "discourag[e] people from coming to California just for higher welfare benefits." In the State's brief opposing the temporary restraining order, it listed "among the bases for implementation of the statute: 'to prevent California from being a magnet for people seeking to increase the level of their public assistance benefits by moving to California.' " *Green*, 811 F. Supp. at 522 n.14. And in its brief to this Court, the State attributes to Congress the intent of "protect[ing] states . . . from becoming 'welfare magnets.' " Pet., p.8.

While the State now claims cost-savings as its rationale for the durational residency requirement, the undisputed record showed that California could have accomplished the same savings simply by reducing benefits across-the-board by about 72 cents per person per month. SER 282 ($22.8 million divided by 12 months, divided by 2,645,814 recipients); *see also Roe v. Anderson*, 966 F. Supp. at 985 (finding that "the State may save a comparable amount of money by a very minor reduction in the benefits paid to all AFDC recipients") & n.20.

2. The Impact of the Statute

The named Plaintiffs each moved to California for reasons unrelated to the receipt of welfare benefits; rather, each moved to pursue employment. *Roe*, 966 F. Supp. at 980. For example, Brenda Roe had never previously been on welfare. She lacked any awareness of CalWORKs, TANF or AFDC when she and her husband decided to leave Oklahoma and settle in California. SER 231. The median monthly average rents in Long Beach, California, where she and her family reside, are $300 for a

studio apartment and $450 to $650 for a one-bedroom apartment. SER 233. She was informed by the State social services office that she would be limited to the Oklahoma monthly grant level of $307, as compared to the California grant level of $565. 966 F. Supp. at 980. As the district court found: "Both of the named plaintiffs have been unable to locate housing in California that they could afford on the reduced grant." *Id.* at 985.

The undisputed evidence showed that "although in absolute terms California benefit levels rank as the sixth highest grant level in the United States," "when housing costs are factored in, California benefit payments rank 18th in the nation." *Id.* at 981. The district court noted that "defendants do not disagree with plaintiffs' contention that there will be disparities, even significant disparities, among California AFDC recipients as between newcomers and recipients who have resided in the state for one year." *Id.* at 982-83.[5] The State submitted no evidence in support of the "welfare magnet" hypothesis; instead, all of the evidence before the court demonstrated that "persons do not move from state to state to seek higher AFDC benefits." *Roe*, 966 F. Supp at 982. *See also id.*

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[5] The amount that newcomers receive would fall substantially short of what is required to subsist – or even to pay rent – in California. In all but two of the states where the maximum aid payment is lower than California's, the cost of living is also below that of California. SER 206-07. The fair market rent for even a one-bedroom apartment in California exceeds the entire assistance grant in nearly every state. SER 205. There are 15 states in which the maximum assistance benefit for a family of three is less than **half** the fair market rent for a one-bedroom apartment in California. SER 207.

at 985 ("The record does not support a finding that there will be an influx of poor persons to California because of California's benefit levels.").

B. PROCEEDINGS BELOW

The district court granted a preliminary injunction against enforcement of the durational residency statute, holding that it imposed an impermissible burden on the fundamental constitutional right to freedom of migration and, alternatively, that it irrationally discriminated based on length of California residency in violation of the Equal Protection Clause. *Roe v. Anderson*, 966 F. Supp. at 983-85 (adopting analysis of "Supreme Court's right of migration and equal protection cases" set forth in *Green v. Anderson*, 811 F. Supp. 516). The court of appeals affirmed the preliminary injunction, concluding that the district court did not err in its determination that Plaintiffs had demonstrated a probability of success on the merits. 134 F.3d at 1404 (citing *Green v. Anderson*, 26 F.3d 95, 96 (9th Cir. 1994)). In particular, the court of appeals reaffirmed that the durational residency requirement violated the Equal Protection Clause by drawing "unconstitutional distinctions . . . among residents of a state." 134 F.3d at 1404. The court of appeals also adhered to the district court's determination that this durational residency requirement was predicated upon the impermissible purpose of "deter[ring] migration of poor people to California." *Id.*

III. REASONS FOR DENYING THE WRIT

A. THIS COURT'S CONSISTENT HOLDINGS COMPEL THE CONCLUSION, REACHED BY THE COURTS BELOW, THAT THE CALIFORNIA STATUTE VIOLATES THE RIGHT TO TRAVEL AND THE EQUAL PROTECTION CLAUSE

1. The Court Has Repeatedly Held that the Constitution Does Not Permit Laws Designed to Inhibit or Penalize Migration Between States

This Court has consistently recognized that a law enacted for the purpose of inhibiting migration into the state is virtually *per se* unconstitutional. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 620 n.9 (1985); *Zobel v. Williams*, 457 U.S. 55, 62 n.9 (1982); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263-64 (1974); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969). This prohibition is rooted in the principle of free interstate travel and migration, which has long received this Court's "unquestioned historic acceptance." *Attorney General of New York v. Soto-Lopez*, 476 U.S. at 902 (plurality opinion).[6] It applies

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[6] As explained by this Court over a century ago:

> For all the great purposes for which the Federal government was formed we are one people, with one common country. We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States.

Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 48-49 (1868) (quoting *The Passenger Cases*, 48 U.S. (7 How.) at 492 (Taney, C.J., dissenting));

equally where, as here, the newcomers sought to be excluded are poor. Recognizing that "the purpose of inhibiting migration **by needy persons** into the state is constitutionally impermissible," this Court has held that "a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally." *Shapiro*, 394 U.S. at 629 (emphasis added), 631.

Since *Shapiro*, this Court has consistently reaffirmed that a statute intended to deter or restrict interstate migration by indigents – even those seeking social services – necessarily requires strict scrutiny. For example, in *Memorial Hospital*, the Court stated that "to the extent the purpose of the requirement is to inhibit the immigration of indigents generally, that goal is constitutionally impermissible." *Memorial Hospital*, 415 U.S. at 263-264 (citations omitted).[7]

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see also United States v. Guest, 383 U.S. 745, 758 (1966) ("a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created"); *Edwards v. California*, 314 U.S. 160, 173-74, (1941); *Kent v. Dulles*, 357 U.S. 116, 126 (1958); *Shapiro v. Thompson*, 394 U.S. at 629-31, 634; *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972); *Memorial Hospital*, 415 U.S. at 254; *Zobel v. Williams*, 457 U.S. at 60 n.6; *Attorney General of New York v. Soto-Lopez*, 476 U.S. at 901-03.

[7] *See also Memorial Hospital v. Maricopa County*, 415 U.S. at 282 (Rehnquist, J., dissenting) (distinguishing the Arizona law from one that "was specifically designed to . . . deter indigent persons from entering the State of California"); *id.* at 283 (distinguishing a "purposeful attempt to insulate the State from indigents"); *id.* at 284 ("purposeful barriers [were] struck down in *Edwards* and *Shapiro*"); *id.* at 285 ("the Court should examine . . . whether the challenged requirement erects a . . . purposeful barrier").

More recently, the Court reiterated this unconstitutional purpose doctrine. In both *Zobel* and *Hooper*, the Court underscored that a "state objective to inhibit migration into the State would encounter 'insurmountable constitutional difficulties.' " *Hooper*, 472 U.S. at 620 n.9 (quoting *Zobel*, 457 U.S. at 62 n.9 and citing *Shapiro*, 394 U.S. at 629). *See Attorney General of New York v. Soto-Lopez*, 476 U.S. at 903 (plurality); *id.* at 920-22 (dissent). As Justice O'Connor further explained in her *Zobel* concurrence,

> It is difficult to imagine a right more essential to the Nation as a whole than the right to establish residence in a new State. Just as our federal system permits the States to experiment with different social and economic programs, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), it allows the individual to settle in the State offering those programs best tailored to his or her tastes.

Zobel, 457 U.S. at 76-77 (O'Connor, J. concurring in judgment).

2. The Court Has Consistently Held That the Equal Protection Clause Does Not Allow States to Treat Some Bona Fide Residents Less Favorably Than Others Based on Their Length of Residency

In keeping with the prohibition against state laws inhibiting interstate migration, the Court has long held that the Equal Protection Clause bars discrimination against newcomer state residents and the State does not challenge this jurisprudence. The Court has accordingly

pointed out that "[i]n reality, right to travel analysis refers to little more than a particular application of equal protection analysis. Right to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents." *Zobel*, 457 U.S. at 61; *see also Soto-Lopez*, 476 U.S. at 904 n.4 ("Of course, regardless of the label we place on our analysis – right to migrate or equal protection – once we find a burden on the right to migrate the standard of review is the same.").

No state, of course, could erect a wall at its borders to block out citizens of other states. By the same token, this Court has frequently affirmed the principle that no state may erect an invisible wall against interstate migration in the form of discriminatory treatment of new arrivals. As the district court put it: "It is this equal treatment aspect of the right to migration – rather than the prohibition on direct barriers to movement – that has been most important in the more recent cases." *Green*, 811 F. Supp. at 518. Far from an uncharted area of law requiring guidance, this Court has long protected new residents of a state "from being disadvantaged, or from being treated differently, simply because of the timing of their migration." *Soto-Lopez*, 476 U.S. at 904-05 (plurality opinion) (citing *Hooper v. Bernalillo County Assessor*, 472 U.S. at 618 n.6; *Zobel*, 457 U.S. at 60 n.6; *Memorial Hospital*, 415 U.S. at 261; *Shapiro*, 394 U.S. at 629-31).

The Court has therefore generally subjected such discrimination against new state residents to strict scrutiny under the Equal Protection Clause. "[A]ny classification which serves to penalize the exercise of th[e] right [to travel], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." *Shapiro*, 394 U.S. at 634 (emphasis in original).

Under this exacting standard, this Court has without exception struck down durational residency requirements with respect to benefits that support the "basic necessities of life." In *Shapiro*, the Court invalidated state denial of welfare assistance to residents who had not yet lived for a year within the state. And in *Memorial Hospital v. Maricopa County*, 415 U.S. 250, the Court invalidated state denial of publicly funded non-emergency medical care to residents who had not yet lived for a year within the state. *Id.* at 261 ("the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents.").[8] As the Court later noted in *Maher v. Roe*, 432 U.S. 464 (1977), *Shapiro* and *Memorial Hospital* "recognized that denial of welfare to one who had recently exercised the right to travel across state lines was sufficiently analogous to a criminal fine to justify strict judicial scrutiny." *Id.* at 474 n.8; *see also Dunn v. Blumstein*, 405 U.S. at 339-60 (invalidating one-year residency requirement for voting).

Even where this Court has declined to apply strict scrutiny, it has nonetheless invalidated state schemes that make public benefits dependent upon the timing of one's

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[8] *See also Memorial Hospital*, 415 U.S. at 259 ("[G]overnment privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements."(listing cases).)

residency in the state. In *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, for example, this Court struck down as irrational a New Mexico law granting a tax exemption to Vietnam veterans only if they had resided in the state prior to a specified date. And in *Zobel v. Williams*, 457 U.S. 55, this Court invalidated as irrational an Alaska statute that distributed income from natural resource development to state residents based upon the year in which they had established residency in the state.

3. No Novel Constitutional Question is Implicated by the California Statute, Which Treats Some Californians Less Favorably Than Others Based on Their Length of Residency

The State here does not directly question the fundamental principle of free interstate migration, nor does it seek to overturn the well-established body of case law under the Equal Protection Clause.[9] Rather, it attempts to

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[9] The State quite properly does not ask for overruling of this line of authority, given that there have been no legal or factual developments that would justify failure to follow the principle of *stare decisis*. Reliance on the principle of free interstate migration extends back not just one, but many generations. *Cf. Planned Parenthood v. Casey*, 505 U.S. at 860 (joint opinion of O'Connor, Kennedy and Souter, JJ.) (observing that in the nineteen years since *Roe v. Wade*, 410 U.S. 113 (1973), "[a]n entire generation has come of age"). This line of authority has in no sense proven "unworkable" nor has there been any "evolution of legal principle [which] has left [its] doctrinal footings weaker than they were. . . ." *Id.* at 855-57. The factual backdrop here has not changed so as to require revisiting this Court's prior holdings. Free interstate migration – and the

distinguish this case from this Court's durational residency requirement holdings by repackaging arguments that have already been expressly repudiated by this Court. The purported distinctions advanced by the State cannot be sustained without effectively overruling many of the cases just cited, and leaving the Court's jurisprudence in tatters. Petitioners' arguments thus offer no sound basis for granting review.

We address the State's two principal claims in turn.

a. The California statute creates a two-tiered benefits scheme based on length of residency with the impermissible purpose of deterring migration

The State first argues that California's statute can be distinguished from those struck down by this Court, because it does not completely deny welfare benefits to new residents, but limits new residents to the amount they would have received in their prior states of residence. This argument cannot save the California durational residency statute, which implicates the rights of interstate migration and equal protection just as surely as other laws that this Court has held unconstitutional.

As a factual matter, the denial in *Shapiro* was not in all instances total either. Although this Court pointed out

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corresponding requirement that bona fide residents be treated equally regardless of when they arrived – remains a "necessary concomitant" of the United States. *United States v. Guest*, 383 U.S. at 758.

that two of the three states there, Connecticut and Pennsylvania, gave "partial assistance," their schemes were nevertheless invalidated. *Shapiro*, 394 U.S. at 635. Just as in *Shapiro*, the primary purpose of California's statute is to prevent indigents from coming here to live. Just as in *Shapiro*, it does so by denying new residents the basic necessities of life – that is, the level of assistance the state legislature has deemed appropriate for subsistence in California. And just as in *Shapiro*, the statute penalizes residents who have come to the state for reasons utterly unrelated to the receipt of welfare assistance. There is nothing innovative about either the motivation for or the results of California's durational residency requirement.

The State's petition, and its ultimate defense of its statute, necessarily hinges upon a claim that is neither novel nor substantial in light of this Court's repeated holdings. In particular, the State argues that the relevant comparison for equal protection purposes is **not** between newcomer and longer-term California residents, but instead between newcomer California residents and **residents of other states**. *See* Pet., p. 18. This argument is directly contrary to this Court's durational residence jurisprudence, and leaves the results in prior cases inexplicable.

For example, if the State's formulation were correct, *Zobel* would necessarily have come out the opposite way. No state other than Alaska provided bounty payments to its citizens based on years of state residency. Under the State's argument, then, Alaska should have been free to pay new Alaska residents precisely the bounty that residents of other states received: nothing at all. As the Court recognized, however, the proper analysis looks to the

inequality of distribution as between new and longer term residents. *Zobel*, 457 U.S. at 60-65.[10]

Indeed, were the State's mode of comparison the right one, states without any income tax would be free to impose income taxes on newcomer state residents alone, for the purpose of discouraging them from migrating or to augment state revenues. For instance, New Hampshire, Washington and Florida, none of which have an income tax, could establish durational residency requirements such that the income of newcomer residents could be taxed at the rates they would have been assessed in their prior states of residence. Such a taxation scheme would present no constitutional problems under the State's analysis, since newcomer residents would be paying the same taxes as residents of the states from which they came.

b. The State's asserted interest in conserving resources cannot support its two-tiered benefits system

Disregarding the statute's text and the legislative history affirming deterrence of migration as section 11450.03's main objective, their own prior representations, and the determinations by both the Court of Appeals and the district court, Petitioners now advance

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[10] Since the State now asserts only fiscal requirements for the durational residency requirement, its attempted distinction of *Zobel* as a permanent classification makes no sense. Surely if it is rational to save money on the backs of newcomers for a year, it would seem to be rational to do so permanently.

conservation of the State's fiscal resources as the principal purpose of its durational residency requirement. This argument too would require jettisoning this Court's settled decisions holding that the goal of saving money does not rise to the level of a compelling state interest.

Nor could such an objective, even if compelling, possibly justify the two-tiered scheme adopted by California. As this Court observed in upholding states' maximum grant schemes, state flexibility must not offend constitutional strictures: "Although a State may adopt a maximum grant system . . . , it may not, of course, impose a regime of invidious discrimination in violation of the Equal Protection Clause. . . . " *Dandridge v. Williams*, 397 U.S. 471, 483 (1970). Likewise, in *Shapiro*, this Court held:

> We recognize that a state has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. . . . [A]ppellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification.

394 U.S. at 633 (footnote omitted).

In *Memorial Hospital*, this Court reiterated:

> [A] State may not protect the public fisc by drawing an invidious distinction between classes of its citizens . . . , so appellees must do more than show that denying free medical care to new residents saves money. The conservation of the taxpayers' purse is simply not a sufficient

> state interest to sustain a durational residence requirement which, in effect, severely penalizes exercise of the right to freely migrate and settle in another State . . .

415 U.S. at 263 (citation omitted). *See also Sosna v. Iowa*, 419 U.S. 393, 406 (1975) ("budgetary or recordkeeping considerations . . . insufficient to outweigh the constitutional claims.")[11]

4. Even If Rational Basis Review Is Applied, the Unconstitutionality of the California Statute Is Confirmed by this Court's Decisions Invalidating Durational Requirements

As set forth above, the State's argument that California's durational residency requirement should be subjected to rational basis analysis already has been foreclosed by this Court, and does not serve as a basis for granting review. Moreover, as the courts below have

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[11] California made an almost identical argument over half a century ago, with respect to a law reflecting "grave and perplexing social and economic dislocation . . . [which] is a matter of common knowledge and concern." *See Edwards v. California*, 314 U.S. 160, 173 (1941) ("The State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. . . . But this does not mean that there are no boundaries to the permissible area of State legislative activity. There are. And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders.").

found, the State cannot justify section 11450.03(a) even under rational basis review. The only purpose that could possibly explain the two-tiered scheme set up by the State of California – that of discouraging poor families from migrating – is a blatantly impermissible one. The distinction the California statute draws is, if anything, less rational than those invalidated in *Zobel*, *Hooper* and *Soto-Lopez*. Thus, even if the question presented by Petitioners were answered in the affirmative, it would not warrant reversal of the lower courts' holdings. It does not merit review.

While saving money is a legitimate state interest, this Court has made clear that distinctions between newer and longer-term residents bear no rational relation to this goal. *See, e.g., Zobel*, 457 U.S. at 61; *Shapiro*, 394 U.S. at 633 n.11. California offers no reason why newcomers should bear a disproportionate share of the financial burden of ameliorating the state's fiscal problems by receiving lesser benefits than other state residents.[12] And, as

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[12] As the district court specifically found, new residents are no better able to bear the loss of subsistence level benefits than longer-term residents. *Green*, 811 F. Supp. at 523 ("This group of residents is no better able to bear the loss of benefits than a group randomly drawn."). As one legislator noted during legislative debate:

> What we are saying to children is, if your family happened to come here from another state looking for a job, and even found a job but was then [laid] off that job, and there is no unemployment insurance; there is no other job opportunity, and to take care of your children you must be on welfare, that somehow their stomachs are a little bit smaller than the stomach of the person who lives next door who has lived in this state over a year; that their need for clothing for a young child going to school is a little bit less than the child living across the street who may also be on welfare through no fault of the child, because the parent has been unable to find a job; that somehow that clothing will be a little bit cheaper because they will have some sort of certificate saying they haven't been here a year.

SER 115 (comments of Assemblyman Burton).

explained above, the undisputed record was that California could, for less than a dollar per person per month, easily save the same amount without visiting deprivation exclusively on newcomers.

Contrary to the State's suggestion, there is nothing exceptional about today's (or, in California's case, yesterday's) economic climate that suggests a need to grant review for purposes of revising the Court's jurisprudence so as to permit discriminatory classifications where none were sanctioned before. To allow states "in times of stress and strain" to recreate themselves as fortresses of economic isolation would "invite a speedy end of our national solidarity." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1934). Difficult economic times have never before led this Court to excuse the absence of any rational basis for treatment of newer state residents as second-class citizens.

The irrationality of California's statute is patently demonstrated by the fact that many interstate migrants are women who must flee in order to escape domestic violence. SER 212-16, 319-21, 323-26. As the uncontroverted record before the district court indicated,

because abusers often stalk victims who leave, abused women can in many cases put an end to the threat of continuing violence only by moving a great distance away from the abuser. *Id.* Forced to leave their financial resources and jobs behind, such women and their children are in an especially precarious economic position. Yet California's two-tiered welfare scheme would hit these women especially hard – without adequate financial assistance, many would be left to either return to their batterers or to face homelessness. *See Casey*, 505 U.S. at 892 (joint opinion of O'Connor, Kennedy and Souter, JJ.) ("Many abused women . . . return to their husbands, in large part because they have no other source of income.").[13]

5. Congress Cannot Authorize the States to Violate the Constitution and Has Not Done So Here

Nothing in the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") licenses any undercutting of the Court's durational residency jurisprudence, nor affords any grounds for review. Here, again, this Court has repeatedly foreclosed any argument that Congress could somehow sanction what would otherwise constitute impermissible infringement of the Equal Protection Clause. The issue is not a novel one, and

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[13] In deliberating on welfare reform in 1996, both houses of Congress expressly recognized that large numbers of women receiving AFDC – 50% to 80% – were victims of abuse. Budget Reconciliation Bill, H. Cong. Res. 178, S. 412, *Cong. Rec.* H6267 (June 12, 1996); *Cong. Rec.*, S6168 (June 13, 1996).

Petitioners neither seek to overturn this Court's holdings in this area, nor provide any basis why the PRWORA makes review any more appropriate.

This Court has repeatedly reaffirmed the bedrock principle, ignored by Petitioners, that: "Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 732-33 (1982) (rejecting an argument by a state university that Congress had authorized it to deny enrollment to qualified males); *Townsend v. Swank*, 404 U.S. 282, 291 (1971); *Graham v. Richardson*, 403 U.S. 365, 382 (1971) ("Although the Federal Government admittedly has broad constitutional power to determine what aliens shall be admitted to the United States, the period they may remain, and the terms and conditions of their naturalization, Congress does not have the power to authorize the individual States to violate the Equal Protection Clause"); *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966); *Macias v. Finch*, 324 F. Supp. 1252, 1258 (N.D. Cal. 1970) (three-judge court), *aff'd sub nom., Macias v. Richardson*, 400 U.S. 913 (1970).

Shapiro v. Thompson in fact squarely rejected the claim that a permissive federal statute could insulate a state statute imposing a durational residency requirement: "Congress may not authorize the States to violate the Equal Protection Clause." 394 U.S. at 641. Just as in *Shapiro*, what is being challenged here is not any federal law, but a state statute: "[I]t is the responsive **state** legislation which infringes constitutional rights. By itself [the federal statute] has absolutely no restrictive effect. It is

therefore not that statute but only the state requirements which pose the constitutional question." *Id.* at 641. This aspect of *Shapiro* plainly controls here. Section 604(c) does not require the states to take any action, let alone unconstitutional action.

B. LOWER COURTS HAVE UNIFORMLY AND RECENTLY CONSTRUED THIS COURT'S DURATIONAL RESIDENCY JURISPRUDENCE TO INVALIDATE STATUTES LIKE CALIFORNIA'S

There is no split of authority warranting this Court's review of the decision below. The State acknowledges five decisions in which the constitutionality of durational residency requirements like California's have been litigated. Pet., p. 10.[14] In fact, there are several additional decisions striking down or enjoining similar durational residency requirements for public assistance. *Mitchell v. Steffen*, 504 N.W. 2d 198, 203 (Minn. 1993), *cert. denied*, 510

[14] The states and cases cited by Petitioners are: Rhode Island, *Westenfelder v. Ferguson*, 998 F. Supp. 146 (D.R.I. 1998) (order granting preliminary injunction), *appeal docketed*, No. 98-1431 (1st Cir. May 14, 1998); Pennsylvania, *Maldonado v. Houstoun*, 177 F.R.D. 311 (E.D. Pa. 1997) (order granting preliminary injunction), *appeal docketed*, No. 97-1893 (3d Cir. Nov. 20, 1997); Minnesota, *Davis v. Doth*, No. 62-C6-97-010231 (Minn. St. Dist. Ct. Dec. 5, 1997 and July 31, 1998) (orders granting temporary and permanent injunction respectively); Washington, *Ruffin v. Quasim*, No. C97-5767 FDB (W.D. Wa. Feb. 6, 1998) (order granting preliminary injunction); and New Jersey, *Sanchez v. Department of Human Services*, No. A-466-97T1F, 1998 N.J. Super. LEXIS 336 (N.J. Super. Ct. App. Div. Jul. 8, 1998) (granting injunction).

U.S. 1081 (1994) (holding six-month residency requirement "unconstitutional under the equal protection clause of the United States Constitution"); *Aumick v. Bane*, 161 Misc.2d 271, 612 N.Y.S.2d 766 (N.Y. Sup. Ct. 1994) (permanently enjoining six-month residency requirement); *Brown v. Wing*, 241 A.D.2d 956, 663 N.Y.S.2d 1025 (N.Y. App. Div. 4 Dep't, July 3, 1997) (affirming permanent injunction against six-month residency requirement in 170 Misc. 2d 554, 649 N.Y.S.2d 988 (N.Y. Sup. Ct. 1996)); *Doe v. Wing*, No. 98/2903 (N.Y. Sup. Ct. July 30, 1998) (holding one-year residency requirement unconstitutional); *Warrick v. Snider*, No. 94-1634 (W.D. Pa. Dec. 9, 1997) (holding 60-day residency requirement unconstitutional); *Hicks v. Peters*, No. 98C3247, ___ F. Supp. ___, (N.D.Ill. July 16, 1998) (permanently enjoining 12-month durational residency requirement); *cf. Strong v. Collatos*, 593 F.2d 420 (1st Cir. 1979) (holding Massachusetts' durational residency requirement for receipt of veterans' welfare benefits unconstitutional).[15] All but two of these

[15] There is only one case in which any court upheld a public assistance waiting period of any length, and that case presented a restriction markedly different from the one at issue here. In *Jones v. Milwaukee County*, 168 Wis. 2d 892, 485 N.W.2d 21 (1992), the Wisconsin Supreme Court by a 4-3 majority upheld a 60-day "waiting period requirement" for general relief benefits. The court based its decision on its conclusion that "the 60 day waiting period [was] so substantially less onerous than the one year waiting period of *Shapiro*." *Id.* at 902. This distinction obviously has no application to the one-year period at issue here. The Wisconsin court took note of the fact that the 60-day waiting period was claimed necessary " 'to establish the bona fides of the applicant's residency.' " *Id.* at 904. In this case, by contrast, California does not assert that its one-year residency requirement is needed to establish bona fide residency. In

opinions postdate this Court's ruling vacating the prior decisions in the predecessor action to this one, underscoring the striking consistency in the lower courts' understanding of this Court's precedent. This broad uniformity strongly supports denial of the petition here.

No division exists among the four federal circuits where courts have been called on to construe this Court's precedent as to durational residency requirements like California's. Each decision relies upon the same body of case law from this Court, including *Shapiro*, *Memorial Hospital*, *Dunn*, *Zobel*, *Hooper*, and *Soto-Lopez*. Each compares for equal protection purposes the treatment of newcomer and longer term state residents, not residents of different states. Each rejects cost savings as sufficient justification for the durational residency requirements at issue. In all but three decisions strict scrutiny is applied, and in those applying rational basis analysis, the statute is also struck down as unconstitutional.

The analysis followed by the court in *Westenfelder v. Ferguson*, 998 F. Supp. 146 (D.R.I. 1998), is representative of the lower courts' understanding and application of this Court's precedent. Rejecting the state's argument that the state's one-year waiting period could be justified by the claimed interest in encouraging new residents to join the labor force, the *Westenfelder* court explained:

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addition, the Wisconsin requirement contained exceptions not present here which mitigated its impact, including exceptions for individuals who were born in the state, or came to the state to join a close relative or accept an offer of employment. *Id.* at 896.

> "[T]his logic would also require a similar waiting period for long-term residents of the State. A state purpose to encourage employment provides no rational basis for imposing a one-year waiting-period restriction on new residents only."

Id. at 155 (quoting *Shapiro*, 394 U.S. at 637-38). The *Westenfelder* court added:

> Defendant also argues that the State has a compelling interest in reforming its welfare system and experimenting with various ways of doing so. This is indeed a legitimate purpose. In the present context, however, it is unclear what "reform" is involved other than discriminating against new residents; indeed, "reform" seems to be a mere euphemism for a variety of purposes long held to be either constitutionally impermissible or at least not compelling.

Id. at 155.

The court also concluded that, even assuming *arguendo* that the statute was only subject to rational basis review, no "rational relationship to a legitimate state purpose" could be shown. *Id.* at 156 (citing *Hooper*, 472 U.S. at 623; *Zobel*, 457 U.S. at 65; *Shapiro*, 394 U.S. at 637-38; *Maldanado*, 177 F.R.D. at 332-33; *Warrick*, slip op., at 21-22; and *Roe v. Anderson*, 966 F. Supp. at 983). Like every other court to consider the question, the court held that the state's one-year "durational residency requirement does not rationally further the purpose of encouraging welfare recipients to seek work and achieve self-sufficiency. . . . " *Id.* at 156 (citing *Shapiro*, 394 U.S. at 637-38).

IV. CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: August 17, 1998

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In The

Supreme Court of the United States

October Term, 1997

ELOISE ANDERSON, Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; and CRAIG L. BROWN, Director, California Department of Finance,

Petitioners,

v.

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petitioners, Eloise Anderson, Director, California Department of Social Services; California Department of Social Services; The Honorable Pete Wilson, Governor of the State of California; and Craig L. Brown, Director, California Department of Finance (hereafter, "California") reply to the Opposition to the Petition for Writ of Certiorari as follows:

Contrary to plaintiffs' arguments, this Court has yet to address the questions presented by the Petition. The question of the appropriate standard of review to be utilized in determining the constitutionality of a statute, such as California Welfare and Institutions Code section 11450.03 ("section 11450.03"), which merely sets the level of public welfare assistance, and does not (and is not intended to) penalize the right to travel, has yet to be determined by this Court. In the absence of such a determination, lower courts persist in subjecting such statutes to an inappropriate strict scrutiny analysis. The continuing importance of this question is shown by the recent Congressional authorization for such durational residency requirements as part of federal welfare reform, and by the number of states which have implemented such programs.

I

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED AS THIS COURT HAS YET TO ADDRESS THE ISSUES PRESENTED BY THIS CASE

Plaintiffs fail to recognize the vital importance of the distinctions between section 11450.03 and other residency requirements previously invalidated by this Court. The critical distinction between section 11450.03 and other invalidated durational residency requirements is that section 11450.03 does not penalize the right to travel. As previously briefed in California's Petition for Writ of Certiorari ("Petition"), section 11450.03 has been narrowly tailored to adjust welfare benefit levels without penalizing the right to travel.

Section 11450.03 explicitly provides that persons subject to the statute receive *at all times* a constitutionally permissible amount of welfare benefits: either what they received, or would have received, in their prior state of residence, or (after one year of residency) the full amount of the California grant. Because newcomers to California are entitled to benefits under section 11450.03, it is an act of legal fiction to maintain either that the statute is intended to prevent indigent people from moving to California, or that section 11450.03 hampers or prevents newcomers in any way from traveling to California, solely as a result of the temporary grant amount mandated by the statute. Section 11450.03 is thus *factually different* from other statutes previously invalidated by this Court because California's statute *does not* render newcomers ineligible for aid, as was the case in *Shapiro v. Thompson*,

394 U.S. 618 (1969).[1] Further, California's statute does not create *permanent* distinctions based on the length of state residency as was the case in *Zobel v. Williams*, 457 U.S. 55 (1982) (size of payments from oil revenues dependent upon years of residence in Alaska), and in *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) and *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986) (preferences for veterans based on length of state residency).

Furthermore, it is an act of legal fiction to maintain that persons subject to section 11450.03 are deprived of the basic necessities of life. Section 11450.03 does not deny eligibility for welfare benefits; to the contrary, it provides for the continuation of the constitutionally permissible amount of welfare benefits newcomers received in their prior state of residence. Section 11450.03 has no impact on the receipt of Medicaid benefits and, in fact, increases the amount of Food Stamps issued to persons subject to section 11450.03. (Appendix to Petition at 38.)

Because this Court has not previously ruled on the standard of review for a statute which does not penalize the right to travel and which establishes a system for the distribution of public benefits based upon, for a limited

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[1] Plaintiffs attempt to distinguish the Connecticut and Pennsylvania statutes at issue in *Shapiro* from the California statute at issue here, by referring to this Court's reference to the "partial assistance" offered by Connecticut and Pennsylvania. *Shapiro*, at 635. Plaintiffs point out a distinction without a difference. Unlike the California statute, the Connecticut and Pennsylvania statutes *denied eligibility* to newcomers, while offering limited, emergency assistance only. *Shapiro*, 623 n.2, 627 n.5.

period of time, length of residency, this Court should grant the petition for writ of certiorari. The importance of this issue of constitutional law was established when this Court previously granted certiorari on this issue. *Anderson v. Green*, 513 U.S. 922 (1994).[2]

The importance of this issue has only increased during the intervening years. At least eleven other States have adopted durational residency requirements similar to section 11450.03. The United States Congress has authorized such requirements as part of federal welfare reform. As to the question of the correct standard of review now presented to this Court, a Pennsylvania trial court has recently applied a rational basis standard of review to Pennsylvania's durational residency requirement. *Maldonado v. Houstoun*, 177 F.R.D. 311 (E.D. Pa. Oct. 6, 1997) (order granting preliminary injunction) *appeal docketed*, No. 97-1893 (3rd Cir. Nov. 20, 1997). This issue has not gone away, it is not settled, and the states and the lower courts need guidance now.

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[2] To the extent that *Shapiro v. Thompson*, 394 U.S. 618, 619 (1969), and its progeny appear to hold that the constitutionality of a statute relating to the administration of public welfare assistance which does not penalize the right to travel, or any other fundamental right, should be subjected to a strict scrutiny analysis, those holdings should be re-examined.

II

PLAINTIFFS MAY NOT RELY UPON MATERIALS REGARDING PROPOSITION 165 OR UPON MATERIALS NOT PRESENTED TO THE DISTRICT COURT TO SUPPORT THEIR ARGUMENTS REGARDING THE CONSTITUTIONALITY OF THE STATUTE

In order to buttress their claim that section 11450.03 is intended to actually prevent indigent people from moving to California (a purpose that does not appear in the wording of section 11450.03, nor in the legislative history of section 11450.03), plaintiffs rely on extraneous materials. Plaintiffs argue that the purpose of the Statute is analogous to other proposed legislative schemes evidenced by materials plaintiffs submitted in support of their motion for preliminary injunction. These materials deal with California Proposition 165, a voter initiative that did not become law, and California Senate Bill 366, which also was not enacted into law. These materials are irrelevant to this Court's consideration of the statute, as neither Proposition 165 nor Senate Bill 366 is a precursor of section 11450.03.

The precursor of section 11450.03 is Senate Bill 485. (Petition, at 3.) Accordingly, it is inappropriate for plaintiffs to rely on their Exhibits 5 (Supplemental Excerpts of Record filed by plaintiffs with the appellate court, "SER" SER49), 6 (SER51), 7 (SER64), 8 (SER67), and 9 (SER85) because those materials are not part of the legislative history of Senate Bill 485. Additionally, to the extent these materials relate to California Proposition 165, it is inappropriate to rely on these materials as that proposition was rejected by the California electorate.

Also, plaintiffs' exhibits are not competent evidence. While affidavits in support of a preliminary injunction need not fit all of the requirements of affidavits in support of a motion for summary judgment, 11 C. Wright and A. Miller, *Federal Practice and Procedure, Civil*, § 2949, at 471 (1973), the materials in the referenced exhibits are not affidavits, verified pleadings, or transcribed deposition materials. The exhibits clearly are not competent evidence.

In *Flynt Distributing Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984) the court noted that the urgency of obtaining a preliminary injunction necessitates a prompt determination and makes it difficult to obtain affidavits from persons who would be competent to testify at trial. The court held that the trial court may give even inadmissible evidence some weight when to do so serves the purpose of preventing irreparable harm before trial. However, the court in *Flynt* was dealing with a prohibitory injunction, i.e., one which merely maintained the status quo, and not with a mandatory injunction such as that sought by plaintiffs in this case. Therefore, this Court should not consider the referenced exhibits because they are not properly authenticated, they are hearsay to the extent they purport to be testamentary in nature, and they clearly are not relevant.

Proposition 165, Assembly Bill 671, the Governor's Budget as analyzed by the Legislative Analyst, and Senate Bill 366 did not become, and are not now, the law of the State of California. They are not relevant legislative history for the statute at issue here which did become law in California.

The California Supreme Court was presented with a similar situation in the case of *Delaney v. Superior Court*, 50 Cal.3d 785 (1990). There, the court was called upon tc determine the electorate's intent in passing a constitutional amendment by initiative which shielded a reporter from contempt proceedings in refusing to answer questions about unpublished information. Delaney, who was seeking the information, argued that the court should look to the legislative history of California Evidence Code section 1070 to determine the intent of the voters in passing the Constitutional amendment. The court responded:

> The history, however, is of no help in that regard. Article I, section 2(b) is plain on its face, and we need not – indeed, should not – search for external indicia of the voters' intent. Moreover, the *legislative* history of section 1070 could, as a matter of logic, reflect only the *Legislature's* intent. That history would not provide us with any guidance as to *the voters'* subsequent intent because none of the indicia of the Legislature's possible intent (committee analysis and digest and letters from the statute's author) were before the voters.

Id. at 801 (citation omitted) (footnote omitted).

Plaintiffs' analysis is even more absurd. They rely on materials regarding a failed amendment to the California Constitution and other legislative materials which did not result in final legislation, to establish the intent of the California Legislature in passing section 11450.03. This Court should not be so detained. The absurdity here is even more pronounced since the ballot materials and the

legislative analysis of *unpassed* bills do not reflect any legislative intent.

Finally, section 11450.03 does not require resort to any materials for an understanding of its provisions. It means exactly what it says. None of plaintiffs' materials reflect applicable legislative history.

CONCLUSION

This Court should grant the petition for writ of certiorari. It presents an important question of federal law which has been pending since at least the last time this Court granted a writ of certiorari on this issue. Furthermore, since that time, the United States Congress has authorized states to implement durational residency requirements as part of federal welfare reform. This recent congressional authorization renders it even more imperative than before for the states and the lower courts to be clear as to the correct standard of constitutional review.

By again granting certiorari on this matter, this Court can provide essential guidance on a recurring and important issue.

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October Term, 1997

ELOISE ANDERSON, Director of the California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; CRAIG BROWN, Director of the California Department of Finance,

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Respondents.

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SUPPLEMENTAL BRIEF IN OPPOSITION

Pursuant to Rule 15.8, Respondents submit this supplemental brief to call this Court's attention to the Third Circuit's recent decision in *Maldonado v. Houstoun*, No. 97-1893, 1998 U.S. App. LEXIS 21909 (Sept. 9, 1998) (affirming on other grounds *Maldonado v. Houstoun*, 177 F.R.D. 311 (E.D. Pa. 1997)), appended hereto. Like the Ninth Circuit, the Third Circuit applied strict scrutiny to strike down a two-tier durational residency requirement in the area of public assistance. The Third Circuit's decision in *Maldonado* wholly undermines Petitioners' argument that there is any conflict or confusion among the lower courts as to the applicable level of scrutiny. In particular, this decision expressly disavows the application of rational basis review by the district court in *Maldonado* – the **only** lower court decision that Petitioners have cited in support of their position that rational basis review applies here. Petition, pp. 12-13; Reply to Opposition to Petition for Writ of Certiorari, p. 4. At the same time, the Third Circuit's decision reinforces the conclusion of every court to consider the question (including the *Maldonado* district court) that two-tier durational residency schemes cannot be sustained, even under rational basis review. The Third Circuit's decision thus eliminates any possible basis for reviewing the instant case.

The Pennsylvania statute at issue in *Maldonado* is virtually identical to the one at issue here. It would limit those who have resided in that state for less than twelve months to the amount that they would have received in their prior state of residence, if that amount is lower. 1998 U.S. App. LEXIS 21909, at *2. While noting that there are areas in which "the constitutional implications of the right to travel is unsettled and in need of clarification," *id.* at *14, the Third Circuit had no difficulty ascertaining the constitutional standard applicable to Pennsylvania's

two-tier public assistance scheme. The Third Circuit squarely held strict scrutiny applicable to Pennsylvania's one-year durational residency requirement for receipt of full public assistance: "[B]ecause Pennsylvania's durational residency requirement discriminates against newly arrived residents and penalizes their fundamental right to travel and migrate, we hold that Pennsylvania's welfare durational requirement is subject to strict scrutiny." *Id.* at *27.

In so holding, the Third Circuit expressly disavowed the Pennsylvania district court's application of rational basis review to this durational residency requirement. *Id.* at *22. Citing this Court's decision in *Zobel v. Williams*, 457 U.S. 55 (1982), the Third Circuit properly recognized that Pennsylvania's two-tier scheme could not be saved by the fact that it provided **some** benefits to new residents: "[T]hat Pennsylvania's scheme does not amount to a complete denial of cash benefits and that it provides recent immigrants with some amount of welfare benefits other than cash assistance is not dispositive." *Id.* at *22-23.[1]

Instead, the *Maldonado* court held:

> [A]s demonstrated by *Shapiro, [Memorial Hospital v.] Maricopa County*, [415 U.S. 250 (1974)] and every equal protection case, the appropriate

[1] The Third Circuit was also correct to point out that the Pennsylvania law is indistinguishable from that struck down in *Shapiro v. Thompson*, 394 U.S. 618 (1969). In particular, the Court squarely rejected the argument – also advanced by Petitioners here – that *Shapiro* could be distinguished on the ground that it involved a total rather than a partial ban on payments to new residents. As the Third Circuit states, "similar to the Pennsylvania scheme under review here, two of the three state laws that the Court struck down in *Shapiro* offered 'partial assistance . . . to some new residents and full assistance . . . to other new residents.'" 1998 U.S. App. LEXIS 21909, at *22 (quoting *Shapiro*, 394 U.S. at 695).

> comparison is between those persons subject to the classification and those persons who are similarly situated but for the classification. Here, whether Pennsylvania's two-tier scheme amounts to a penalty must be determined by comparing new residents of Pennsylvania and other similarly situated longer-term Pennsylvania residents, and not by comparing new residents of Pennsylvania and those of their former state. . . .
>
> From a constitutional standpoint, it is of no consequence that the [plaintiffs] receive the same benefits that they would have received in Puerto Rico. Pennsylvania's two-tier welfare scheme penalizes the [plaintiffs] for having exercised their right to travel by treating them significantly less favorably than other similarly situated longer-term Pennsylvania residents solely because they exercised that right more recently.

Id. at *23, 25.

As the Third Circuit recognized, this point is "reinforced by the holdings in *Zobel*, *Hooper [v. Bernalillo County Assessor*, 472 U.S. 612 (1985)], and *[Attorney General of New York v.] Soto-Lopez*, [476 U.S. 898 (1986)], where the Court held unconstitutional state benefit schemes that were unique to the states involved and which did not even exist in the prior states of residence." *Id.* at *25-26. "Although the level of scrutiny to which durational residency requirements are subject may not be applied similarly in all contexts, that the appropriate comparison is between short- and longer-term Pennsylvania residents is well-established by the foregoing body of Supreme Court precedent." *Id.* at *24 (relying on *Soto-Lopez*, *Zobel*, *Hooper*,

Shapiro, and *Maricopa County*).[2] Because newer residents are accorded less favorable treatment than longer-term residents, the Third Circuit (like the Ninth Circuit) applied strict scrutiny, which Pennsylvania's scheme could not satisfy. *Id.* at *27.

The Third Circuit's opinion also confirms that two-tier residency schemes like California's and Pennsylvania's cannot even survive rational basis review. Just as in this case, the State attempted to support the statute on the ground that it was intended to "prevent Pennsylvania from becoming a 'welfare magnet.' " *Id.* at *27. As both the district court and the court of appeals in *Maldonado* held, this purpose is illegitimate and impermissible: "The district court found this purpose clearly unconstitutional under *Shapiro* and its progeny. We agree, and it does not warrant additional discussion." *Id.* at *27. Nor could the two-tier scheme be upheld as a device designed to encourage self-sufficiency: "If encouraging work truly

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[2] Petitioners do not seriously argue that any of this Court's durational residency cases should be overturned. They did not so argue in their Petition. In their reply brief, they mention this issue only in a footnote, arguing that: "To the extent that *Shapiro v. Thompson*, 394 U.S. 618, 619 (1969), and its progeny appear to hold that the constitutionality of a statute relating to the administration of public welfare assistance which does not penalize the right to travel, or any other fundamental right, should be subjected to a strict scrutiny analysis, those holdings should be re-examined." Reply, p.4 n.2. But as the Third Circuit recognized in *Maldonado*, "newer residents . . . plainly are 'penalized' for having exercised their right to travel and migrate," when they are treated less favorably than longer-term residents "based solely on residential duration." 1998 U.S. App. LEXIS 21909, at *26. Any contrary conclusion would unhinge not only *Shapiro* and *Maricopa County*, but also all this Court's decisions – including *Zobel*, *Hooper*, and *Soto-Lopez* – holding that the appropriate basis of comparision is between newer residents and longer-term residents. *See id.* at *23-26.

were the goal, . . . all residents should be subject to a waiting period, not just new residents. . . . There is simply no rational reason, let alone a compelling reason, to assume that only new residents from states that offer lesser benefits than Pennsylvania need 'encouragement' to seek work and self-sufficiency." *Id.* at *28-29.

The Third Circuit's decision in *Maldonado* thus eliminates any conceivable doubt as to the unconstitutionality of twelve-month durational residency requirements in the area of public assistance, and the level of scrutiny applicable to such schemes. Rejecting the reasoning employed by the *Maldonado* district court – the lower court decision on which Petitioners base their argument for rational basis review – the Third Circuit subjected Pennsylvania's law to strict scrutiny. At the same time, the Third Circuit's decision confirms the "irrationality" of such laws, *id.* at *29, and thus their unconstitutionality under any level of scrutiny.

Dated: Sept. 17, 1998

Respectfully submitted,

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APPENDIX

EDWIN MALDONADO; MARIA DELORES MALDONADO, individually and as next friends of Ana Maldonado, Pablo Maldonado, Edwin Maldonado, Rey Maldonado, Yesenia Maldonado, and Jose Maldonado, and on behalf of all others similarly situated; MARIA ORTIZ; MICHAEL ORTIZ, individually and as next friends of Julie Ortiz, Michael Ortiz, and Angelica Ortiz, and on behalf of all other similarly situated; KENSINGTON WELFARE RIGHTS UNION; PHILADELPHIA WELFARE RIGHTS ORGANIZATION, on behalf of themselves and their members; TRAVELER'S AID SOCIETY OF PHILADELPHIA, individually and on behalf of its clients v. FEATHER O. HOUSTOUN, Secretary of the PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE; DON JOSE STOVALL, Executive Director of the PHILADELPHIA BOARD OF ASSISTANCE, both in their official capacities, Appellants

No. 97-1893

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

September 9, 1998, Filed

PRIOR HISTORY: Appeal from the United States District Court For the Eastern District of Pennsylvania. D.C. No.: 97-cv-04155.

DISPOSITION: Affirmed.

COUNSEL: John G. Knorr, III (Argued), Office of Attorney General of Pennsylvania, Department of Justice, Strawberry Square, 15th Floor, Harrisburg, PA 17120, Counsel for Appellant.

Susan Frietsche (Argued), Women's Law Project, 125 South 9th Street, Suite 401, Philadelphia, PA 19107, Counsel for Appellee.

JUDGES: Before: STAPLETON, ROSENN, Circuit Judges, and RESTANI, Judge, United States Court of International Trade.*

OPINION BY: ROSENN

OPINION: OPINION OF THE COURT

ROSENN, Circuit Judge.

This appeal presents a significant constitutional question implicating an aspect of Pennsylvania's recent amendment to its public assistance benefits legislation. Pennsylvania made the change during a recent wave of federal and state welfare reform legislation which swept the nation calling for a reduction in overall welfare expenditures. Specifically, we must decide the constitutionality of § 9(5)(ii) of Pennsylvania's Act 35 of 1996. See Pa. Stat. Ann., tit. 62, § 432(5)(ii). It mandates that an eligible family arriving in Pennsylvania from another state shall, during its first twelve months of bona fide residence, receive as cash benefits the lesser of: (1) the benefit level available to similarly situated Pennsylvania residents of twelve months or more, or (2) the benefit level the family would have been eligible to receive in their prior state had they not moved to Pennsylvania.

In 1997, several months after the passage of this legislation, Maria and Edwin Maldonado and their six

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* The Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

minor children migrated to Pennsylvania from Puerto Rico. They became eligible for public assistance benefits but were informed that the cash benefits allowance available to them would be substantially lower than the benefits provided to similarly situated long-term Pennsylvania residents.[1]

Shortly thereafter, the Maldonados and several organizations that represent their interests (collectively, the "Maldonados"), instituted a class action against Feather O. Houstoun, Pennsylvania's Secretary of Public Welfare, and Don Jose Stovall, Executive Director of the Philadelphia Board of Assistance, both in their official capacities (collectively, the "Commonwealth"), in the United States District Court for the Eastern District of Pennsylvania. The Maldonados sued pursuant to 42 U.S.C. § 1983, seeking declaratory and injunctive relief, claiming that Pennsylvania's two-tier welfare scheme violates their constitutional rights to travel, to equal protection, and to non-discriminatory treatment under the Privileges and Immunities Clause. The district court held that the scheme did not appear to be supported by a rational basis, and thus likely violated the Fourteenth Amendment's Equal Protection Clause. Therefore, the court preliminarily enjoined enforcement of the two-tier scheme and certified the class, with the Maldonados as class

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[1] Pennsylvanians with a twelve month residence were eligible for cash benefits of $836 but the Maldonado family, because of their less than a twelve month residence, was eligible for cash benefits of only $304 per month, the amount they would have been allowed in Puerto Rico.

representatives. The Commonwealth timely appealed the injunction. We affirm, although our analysis differs.

I.

The relevant facts of this case are for the most part undisputed. In May 1996, after several attempts to pass similar measures failed throughout the early 1990s, Pennsylvania, as part of the state's broad-scale welfare reform, enacted Section 9(5)(ii), governing public assistance benefits to eligible families that have resided in Pennsylvania for less than one year. Section 9(5)(ii) provides that during the first twelve months of residence in Pennsylvania, an eligible family's cash assistance benefits are limited to the lesser of (1) the benefit level that family would have received in its prior state of residence, or (2) the benefit level available to otherwise similarly situated long-term Pennsylvania residents.[2] Because Pennsylvania grants larger cash benefits than 40 other states, under this two-tier scheme, a typical eligible family moving to Pennsylvania would lose anywhere from over 60%, to as little as 2%, of their cash benefits for the first twelve months that they reside in the state.

---

[2] Section 9(5)(ii), in its entirety, reads as follows:

> Cash assistance for applicants and recipients of aid to families with dependent children who have resided in this Commonwealth for less than twelve months shall not exceed the lesser of the maximum assistance payment that would have been received from the applicant's or recipient's state of prior residence or the maximum assistance payment available to the applicant or recipient in this Commonwealth.

Pennsylvania's legislation received considerable reassurance when several months later, in August 1996, Congress passed landmark welfare reform legislation known as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), 42 U.S.C. §§ 601, et seq. The PRWORA dramatically changed the climate for welfare programs in this country and encouraged states to adopt restrictive cash benefit programs of the type contained in Pennsylvania's Act 35 for those relocating from another state. Among other things, the PRWORA changed the basic funding format for state Temporary Assistance to Needy Families ("TANF")[3] plans to awards of block grants, expressly terminating the prior program's entitlement nature. Especially relevant to this appeal is Section 604(c) of the PRWORA, which explicitly authorized two-tier cash benefits provisions like that enacted by Pennsylvania. Section 604(c) authorized states to treat new residents differently than longer-term residents.

Prior to May 1997, Plaintiff Edwin Maldonado worked as a mechanic in Puerto Rico and supported his family with his salary plus government-provided nutritional and medical assistance. In May 1997, Maldonado's job ended. He and his wife both had health problems, and therefore in May 1997, they and their six children moved from Puerto Rico to Philadelphia, Pennsylvania, where Mr. Maldonado was born and spent part of his childhood, to seek better health care.

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[3] TANF replaced the former federal welfare program popularly known as Aid to Families with Dependent Children ("AFDC").

Shortly after establishing residence in Pennsylvania, the Maldonados applied for TANF benefits. The Pennsylvania Department of Public Welfare ("DPW") approved their application and also certified that both Mr. and Mrs. Maldonado temporarily were unable to work. Under Pennsylvania's revised welfare scheme, the Maldonados qualified for monthly cash benefits of $304, the amount they would have received in their prior place of residence, Puerto Rico, $720 in food stamps and medical benefits paid by the state of $1,483.60, plus a one-time grant of $213 to defray job-search expenses.[4] Had the Maldonados been residents of Pennsylvania for at least twelve months, they would have been eligible for cash benefits of $836 per month instead of the $304 in benefits that they actually received, a reduction of almost 64%.

As a result of the DPW's benefits decision, the Maldonados sued the Commonwealth on June 19, 1997, seeking a temporary restraining order (TRO) and declaratory and injunctive relief. They claimed that Pennsylvania's two-tier durational residency structure violated their fundamental right to travel, their rights under the Equal Protection Clause of the Fourteenth Amendment, and their rights under the Privileges and Immunities Clause of Article IV and the Fourteenth Amendment.

After denying the plaintiffs' motion for a TRO, the court held a two-day hearing on the application for a preliminary injunction. On October 6, 1997, after considering the memoranda, transcripts, exhibits, and other

[4] The Maldonados returned the $213 grant as both were certified temporarily unable to work.

evidence contained in the sizeable and well-developed record, the district court certified the class and preliminarily enjoined enforcement of Pennsylvania's two-tier durational residency requirement. The court, applying rational basis Equal Protection analysis, held the law irrational. It found that the class members were likely to succeed on the merits of their constitutional claim that the class would suffer irreparable harm absent the injunction, rejected the Commonwealth's fiscal harm arguments, and found that the public interest would be best served by granting the injunction.[5] The Commonwealth timely appealed. The district court placed the action in civil suspense pending resolution of this appeal.[6]

II.

On appeal, when considering the district court's grant of a preliminary injunction, we review the court's legal conclusions de novo, its findings of fact for clear error, and its ultimate decision to grant or deny the preliminary injunction for an abuse of discretion. See, e.g., *Anderson v. Davila*, 37 V.I. 496, 125 F.3d 148, 159 (3d Cir. 1997); *New Jersey Hosp. Ass'n v. Waldman*, 73 F.3d 509, 512 (3d Cir. 1995). Because this appeal presents solely

[5] On October 30, 1997, the court granted in part and denied in part the Maldonados' motion to amend their complaint to include two additional families as plaintiffs and class representatives, allowing one family – the Ortizes – to join and denying the other.

[6] The district court had jurisdiction over this civil rights action pursuant to 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction over the district court's grant of a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1).

legal questions pertaining to the constitutionality of Section 9(5)(ii) of Pennsylvania's welfare act, our review is plenary. Ordinarily, limited review is appropriate at the preliminary injunction stage of a constitutional challenge to a state statute, but since the issue is legal and the facts are well established, we "need not abstain from addressing the constitutional issue." *Thornburgh v. American College of Obst. and Gyn.*, 476 U.S. 747, 756, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986).

A.

The Commonwealth succinctly frames the appellate issue in these words: "Whether Pennsylvania violates the Constitution by providing that, for one year after their arrival in Pennsylvania, applicants for certain welfare benefits may receive only the amount they would have received in their state of prior residence." Thus, we are called upon only to determine the constitutionality of the state statute; the federal statute, PRWORA, is not before us. From a procedural perspective, the district court decided the case on the Maldonados' motion for a preliminary injunction. A district court should grant a preliminary injunction only if (1) the plaintiff is likely to succeed on the merits; (2) denial will result in irreparable harm to the plaintiff; (3) granting the injunction will not result in irreparable harm to the defendant; and (4) granting the injunction is in the public interest. See *Merchant & Evans, Inc. v. Roosevelt Bldg. Prods. Co., Inc.*, 963 F.2d 628, 632-33 (3d Cir. 1992). After weighing these factors, and although the district court found that all four weighed in the Maldonados' favor, it relied almost exclusively on the first, the likelihood of success on the merits. Thus, if the

court incorrectly determined that the Maldonados were likely to succeed on the legal merits of their claim, it erred in granting the injunction. Because the Commonwealth limits its appeal to the merits issue, we need only address the propriety of the district court's legal conclusions.

B.

Under the Equal Protection clause, no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Pennsylvania's two-tier act warrants equal protection analysis because it classifies bona fide residents of the state into two groups when determining welfare benefits. In determining the extent of cash welfare benefits, Pennsylvania created two classes of indigent residents indistinguishable from each other except that one is composed of residents who have resided in the state a year or more, and the other of residents who have resided in the state less than a year.

Even though a state has created a classification, not all classifications are per se unconstitutional or automatically subject to heightened judicial scrutiny. If Pennsylvania's durational residency classification " 'neither burdens a fundamental right nor targets a suspect class, we will uphold [it] so long as it bears a rational relation to some legitimate end.' " See *Vacco v. Quill*, 138 L. Ed. 2d 834, 117 S. Ct. 2293, 2297 (1997) (quoting *Romer v. Evans*, 517 U.S. 620, 631, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996)); see also *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 17, 36 L. Ed. 2d 16, 93 S. Ct. 1278

(1973). However, if the two-tier scheme is drawn on suspect lines or does sufficiently burden a fundamental right, it is subject to strict scrutiny and will pass constitutional muster only if it is narrowly tailored to serve a compelling state interest. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 335, 31 L. Ed. 2d 274, 92 S. Ct. 995 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969).

The Commonwealth argues that the district court correctly held that Pennsylvania's two-tier durational residence requirement does not penalize the plaintiffs' fundamental right to travel or their right to equal protection, and thus is not subject to strict scrutiny. Instead, it argues that the court erred in holding that the scheme was unconstitutional under rational basis review when it found that it was not related to a legitimate governmental interest. The Commonwealth contends that the statute is rationally related to furthering the Commonwealth's legitimate interest in fostering the self-sufficiency and work ethic of its citizens, including its newest citizens. By leaving recent interstate migrants with the same benefit level as they were in their former place of residence, the statute encourages them to seek work, rather than increased benefits. The Maldonados, not surprisingly, argue that although the court was correct in holding that the statute did not pass rational basis review, that the two-tier scheme penalizes the plaintiffs' fundamental right to travel, and thus should be subject to strict scrutiny. Neither party claims that the scheme classifies on suspect lines.

C.

The constitutional right to travel is not contained in the text of the Constitution, and a majority of the Supreme Court of the United States has never agreed upon its textual source. Analytically, the Court has recognized that the historical foundation upon which this Republic was structured was that we are all citizens of the United States, one people, and, as such, we "must have the right to pass and repass through every part of [the country] without interruption, as freely as in our own States." See *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849). This right to pass freely from one state to another was one of the attractive features that persuaded the colonists to unite into a nation. The Supreme Court repeatedly and consistently has recognized a fundamental right to interstate travel, see e.g., *United States v. Guest*, 383 U.S. 745, 16 L. Ed. 2d 239, 86 S. Ct. 1170 (1966); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 18 L. Ed. 745 (1867); *The Passenger Cases*, 48 U.S. 283, and that inextricably implicated therein is the right to migrate to and settle in another state. See, e.g., *Jones v. Helms*, 452 U.S. 412, 417-19, 69 L. Ed. 2d 118, 101 S. Ct. 2434 (1981); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 39 L. Ed. 2d 306, 94 S. Ct. 1076 (1974); *Dunn v. Blumstein*, 405 U.S. 330, 338, 31 L. Ed. 2d 274, 92 S. Ct. 995; *Shapiro*, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322.

Regrettably, however, the law with respect to the constitutional implications of the right to travel is unsettled and in need of clarification. The Court has at times subjected durational residence laws that impinge on the right to travel to strict scrutiny, see *Maricopa County*, 415

U.S. 250, 39 L. Ed. 2d 306, 94 S. Ct. 1076; *Dunn v. Blumstein*, 405 U.S. 330, 31 L. Ed. 2d 274, 92 S. Ct. 995; *Shapiro*, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322, and at other times to what appears to be some form of a heightened rational basis test.[7] Furthermore, although never formally recognized by the Court, we have previously noted that Shapiro and its progeny arguably were analyzed, at least in part, as if the classifications at issue were somewhat suspect, in that they "penalized a group of people on the basis of their having exercised a constitutionally protected right to travel." See *Lutz v. City of York, Pennsylvania*, 899 F.2d 255, 265 (3d Cir. 1990); see also Thomas R. McCoy, Recent Equal Protection Decisions – Fundamental Right to Travel or "Newcomers" as a Suspect Class?, 28 Vand. L. Rev. 987 (1975); Todd Zubler, The Right to Migrate and Welfare Reform: *Time for Shapiro v. Thompson to Take a Hike*, 31 Val. U. L. Rev. 893, 904-05 (1997).

In the seminal right to travel case of *Shapiro*, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322, the Court subjected to

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[7] See *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 90 L. Ed. 2d 899, 106 S. Ct. 2317 (1986); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 86 L. Ed. 2d 487, 105 S. Ct. 2862 (1985); *Zobel v. Williams*, 457 U.S. 55, 72 L. Ed. 2d 672, 102 S. Ct. 2309 (1982); see also *Coburn v. Agustin*, 627 F. Supp. 983, 988-94 (D. Kan. 1985) (discussing the Supreme Court's use of "heightened rational basis scrutiny"); *Alvarez v. Chavez*, 886 P.2d 461, 466-67 (N.M. Ct. App. 1994) (same); Laurence H. Tribe, American Constitutional Law, § 16-3 (2d ed. 1988) (discussing the "new, more penetrating character" of the rational basis test, which he labels "covertly heightened scrutiny"); Gayle Lynn Pettinga, Note, Rational Basis with Bite: Intermediate Scrutiny by Any Other Name, 62 Ind. L.J. 779, 787-92 (1987) (discussing "rational basis with bite in the right-to-travel context").

strict scrutiny several state laws that created one-year durational residence requirements as a prerequisite to eligibility for any welfare benefits. In construing a strikingly similar Pennsylvania statute, the Court in Shapiro expressly held that "any classification which serves to penalize the exercise of the right [to travel], unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." *Id.* at 634. The Shapiro Court reasoned that the one-year residence requirement imposed on recent migrants as a condition of welfare eligibility, which resulted in a complete denial of benefits for those persons residing in the state for less than one year, was unconstitutional, because it discriminated based solely on length of residency in the state and thus unconstitutionally burdened the plaintiffs' fundamental right to interstate travel and migration.

Five years later, in Maricopa County, the Court, applying Shapiro, similarly subjected to strict scrutiny an Arizona law that required one-year residency in a county as a prerequisite to receiving free non-emergency hospital or medical care. 415 U.S. 250. The Maricopa County Court acknowledged that "any durational residence requirement impinges to some extent on the right to travel" and thus not all durational residency requirements are per se unconstitutional. *Maricopa County*, 415 U.S. at 256. The Court further stressed, however, that "the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents." *Id.* at 261. Thus, because it found that "medical care is as much 'a basic necessity of life' to an indigent as [the] welfare assistance" at issue in Shapiro, and that

the classification penalized those persons who had "exercised their constitutional right of interstate migration, [the statute] must be justified by a compelling state interest." *Id.* at 258-59 (citation omitted). The Court then struck down the law, finding that the Arizona statute created "an 'invidious classification' that impinges on the right of interstate travel by denying newcomers 'basic necessities of life,' " and was not supported by compelling justifications or narrowly drawn. 415 U.S. at 269.

Since Shapiro and Maricopa County, a majority of the Court has never subjected a durational residency requirement to strict scrutiny. Instead, the Court sometimes employs some form of rational basis review, and, occasionally, analyzes such laws without even implicating the fundamental right to travel. See, e.g., *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 90 L. Ed. 2d 899, 106 S. Ct. 2317 (1986) (four of the justices applied strict scrutiny in an opinion which did not command a majority); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 86 L. Ed. 2d 487, 105 S. Ct. 2862 (1985); *Zobel v. Williams*, 457 U.S. 55, 72 L. Ed. 2d 672, 102 S. Ct. 2309 (1982). This tendency, however, does not establish that rational basis is now the appropriate test when evaluating durational residency requirements as applied to welfare benefits. The Court in those cases merely employed its version of rational basis analysis because the challenged laws could not even survive rational basis review. Thus, the Court found it unnecessary to subject the laws to heightened scrutiny. See, e.g., *Soto-Lopez*, 476 U.S. at 904 (explaining that because the "contested classifications [in Zobel and Hooper] did not survive even rational basis, [the Court] had no occasion to inquire whether enhanced scrutiny

was appropriate"). The holdings of Shapiro and Maricopa County subjecting durational residency requirements that impinge on the right to travel to strict scrutiny, however, have never been overturned and thus are binding precedent to which we adhere in deciding this factually and legally similar case.

In deciding whether a durational residency requirement sufficiently impinges upon the right to travel or migrate to trigger strict scrutiny, the Court looks to see whether the challenged law's "primary objective" is to impede interstate travel; whether it "penalizes the exercise of that right;" or whether it "actually deters such travel." *Soto-Lopez*, 476 U.S. at 903 (plurality opinion) (internal quotations and citations omitted); see also *Shapiro*, 394 U.S. at 628-34. Here, relying on the legislature's express intent "to promote the self-sufficiency of all the people of the Commonwealth," Pa. Stat. Ann., tit. 62, § 401(a), the district court, in a very thoroughly drafted opinion, agreed with the Commonwealth that the statute's primary objective was not to deter interstate travel and migration. The court also found that the plaintiffs offered no conclusive evidence that the durational residency requirement actually deters the right. Even accepting the district court's conclusions of law that travel deterrence was not the statute's primary objective and the court's finding that the plaintiffs' failure to establish that the duration requirement actually deterred, we are still left with the formidable task of determining whether having exercised the Constitutional right to travel, the plaintiffs were penalized because of the duration of their residence.

The district court ultimately employed rational basis review because it found that the Maldonados could not "demonstrate that Section 9(5)(ii)'s durational residence requirement results in a 'penalty' on the right to interstate migration." The court distinguished this case from Shapiro on the ground that scheme at issue in Shapiro resulted in a total deprivation of welfare benefits needed to obtain "life's basic necessities," whereas here the Pennsylvania statute amounted only to a reduction in cash benefits. The law did not deny the Maldonados other welfare benefits. The court compared the Maldonados' position before and after exercising the right, and found it significant that the Maldonados continued to be eligible for TANF benefits at the same level they would have received in Puerto Rico (plus food stamps, medical benefits, and other assistance). Accordingly, the court concluded that

> the lower benefits do not make new residents any worse off because [they] receive exactly what they were receiving or would have received in their state of prior residence. Thus, the 'penalty' that plaintiffs allege is imposed on them for exercising their right to migrate interstate is not a 'penalty' in the traditional sense of the word – a lost benefit that the person would have received had he not exercised some constitutional right. Indeed, the plaintiffs here have lost no benefit that they would have received had they not exercised their right to migrate. . . . Thus, . . . [this court] finds that Section 9(5)(ii)'s multi-tier durational residency does not act as a penalty on plaintiffs' right to interstate migration.

Maldonado v. Houstoun, 177 F.R.D. 311, 331-32 (E.D. Pa. 1997).

Although the Supreme Court has never made clear the "amount of impact required to give rise to the compelling-state-interest test," *Maricopa County*, 415 U.S. at 256-57, we are persuaded that the district court's "penalty" analysis in this case misconstrued the import of the relevant case law and used an improper comparison. Thus it erroneously concluded that Pennsylvania's two-tier welfare scheme does not amount to a penalty. First, similar to the Pennsylvania scheme under review here, two of the three state laws that the Court struck down in Shapiro offered "partial assistance . . . to some new residents and full assistance . . . to other new residents." See *Shapiro*, 394 U.S. at 635; see also *Zobel*, 457 U.S. at 60-66 (holding unconstitutional state distribution of benefits to citizens on a sliding scale based on how long they have lived in the state); Erwin Chemerinsky, Constitutional Law: Principles and Policies, § 10.7, at 703-04 (1997) ("The Supreme Court . . . has ruled that laws that do not totally deny benefits, but provide less to new arrivals are unconstitutional."). Thus, that Pennsylvania's scheme does not amount to a complete denial of cash benefits and that it provides recent immigrants with some amount of welfare benefits other than cash assistance is not dispositive.

Second, and more importantly, as demonstrated by Shapiro, Maricopa County, and every equal protection case, the appropriate comparison is between those persons subject to the classification and those persons who are similarly situated but for the classification. Here, whether Pennsylvania's two-tier scheme amounts to a

penalty must be determined by comparing new residents of Pennsylvania and other similarly situated longer-term Pennsylvania residents, and not by comparing new residents of Pennsylvania and those of their former state. Once the Maldonados established bona fide residency in Pennsylvania, a comparison of residents of Puerto Rico with long-term Pennsylvania residents for equal protection purposes is neither sound nor logical; it is not a comparison between analogues. Residents of Puerto Rico have no claim to Pennsylvania welfare benefits or to equal protection under Pennsylvania's welfare laws until they move from Puerto Rico and establish a bona fide residence in Pennsylvania. Only once those persons reside in Pennsylvania is the classification applicable to them.

Although the level of scrutiny to which durational residence requirements are subject may not be applied similarly in all contexts, that the appropriate comparison is between short- and longer-term Pennsylvania residents is well-established by the foregoing body of Supreme Court precedent. Moreover, our conclusion that the appropriate penalty analysis must compare shorter-term with longer-term Pennsylvania residents has been reached by numerous other federal and state courts that have considered this precise, or substantially similar, issue.[8]

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[8] See *Roe v. Anderson*, 966 F. Supp. 977, 984-85 (E.D. Cal. 1997), *aff'd*, 134 F.3d 1400, 1404-05 (9th Cir. 1998), *petition for cert. filed*, (U.S. July 9, 1998) No. 98-97); *Green v. Anderson*, 811 F. Supp. 516, 521 (E.D. Cal. 1993), *aff'd*, 26 F.3d 95 (9th Cir. 1994), judgment vacated as unripe, 513 U.S. 557 (1995) (per curiam); *Westenfelder v. Ferguson*, 998 F. Supp. 146, 154 (D.R.I. 1998); *Mitchell v. Steffen*, 504 N.W.2d 198, 201-02 (Minn. 1993); *Sanchez v. Department of Human Services*, 314 N.J. Super. 11, 713 A.2d 1056, 1998 WL 391584, at *5 (N.J. Super. Ct. App. Div. 1998); *Brown v. Wing*, 170 Misc. 2d 554, 649 N.Y.S.2d 988, 995 (N.Y. Sup. Ct. 1996), *aff'd*, 241 A.D.2d 956 (1997); see also *Aumick v. Bane*, 161 Misc. 2d 271, 612 N.Y.S.2d 766 (N.Y. Sup. Ct. 1994); Robert C. Farrell, Classifications That Disadvantage Newcomers and the Problem of Equality, 28 U. Rich. L. Rev. 547, 609 (1994) (arguing that the "relevant comparison . . . [is] between newcomers and the established residents of the new state"); cf. *Hicks v. Peters*, F. Supp., 1998 U.S. Dist. LEXIS 11518, No. 98 C3247, 1998 WL 424176 (N.D. Ill. July 17, 1998) (declining to reach the issue of whether the Illinois durational residence statute imposes a penalty because it failed rational basis review). But cf. *Jones v. Milwaukee County*, 168 Wis. 2d 892, 485 N.W.2d 21 (Wisc. 1992) (finding that a 60 day durational residency requirement for general relief benefits is "substantially less onerous than the one year waiting period of Shapiro, . . . does not operate to penalize an individual's right to travel," and passes rational basis review).

From a constitutional standpoint, it is of no consequence that the Maldonados receive the same benefits that they would have received in Puerto Rico. Pennsylvania's two-tier welfare scheme penalizes the Maldonados for having exercised their right to travel by treating them significantly less favorably than other similarly situated longer-term Pennsylvania residents solely because they exercised that right more recently.

It is well-established "that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution." *Harman v. Forssenius*, 380 U.S. 528, 540, 14 L. Ed. 2d 50, 85 S. Ct. 1177 (1965); accord *Dunn v. Blumstein*, 405 U.S. at 341. This, however, is exactly what Pennsylvania's two-tier durational residence scheme

does. The $532 monthly reduction in the Maldonados' Pennsylvania benefits, based solely on their newly arrived status amounts to a 64% reduction in cash benefits and plainly penalizes them for having exercised their right to migrate into the state.

This point is further reinforced by the holdings in Zobel, Hooper, and Soto-Lopez, where the Court held unconstitutional state benefit schemes that were unique to the states involved and which did not even exist in the plaintiffs' prior state of residence. See, e.g., *Soto-Lopez*, U.S. 476 at 907, 911-12 ("Once [out-of-staters] establish bona fide residence in a State, they become the State's 'own' and may not be discriminated against solely on the basis of [the date of] their arrival in the State. . . . For as long as [the State] chooses to offer [a benefit to its residents,] the Constitution requires that it do so without regard to [time of] residence.") (citations and internal quotations omitted); *Hooper*, 472 U.S. at 623 ("The State may not favor established residents over new residents based on the view that the State may take care of 'its own,' if such is defined by prior residence."). Thus, from a constitutional viewpoint, the level of benefits available to the claimants in the state of their prior residence is irrelevant. What the Court found significant, however, was the difference in benefits provided to the claimants in the state of their new residence based solely on residential duration. Here too, newer residents, such as the Maldonados, plainly are "penalized" for having exercised their right to travel and migrate.

Thus, because Pennsylvania's durational residency requirement discriminates against newly arrived residents and penalizes their fundamental right to travel and

migrate, we hold that Pennsylvania's welfare durational requirement is subject to strict scrutiny. Accordingly, to pass constitutional muster, the Commonwealth must show that the residential requirement is necessary to promote a compelling state interest and is narrowly drawn to meet that end. Partly because the Commonwealth argues that the law should be reviewed under rational basis analysis, it has not presented anything even remotely resembling a compelling interest which would justify the law or shown that it is narrowly tailored to meet its asserted ends.

First, one of the purposes of the statute articulated by the Commonwealth in the district court is to prevent Pennsylvania from becoming a "welfare magnet." The district court found this purpose clearly unconstitutional under Shapiro and its progeny. We agree, and it does not warrant additional discussion. See, e.g., *Shapiro*, 394 U.S. at 629. Second, the Commonwealth's argument that the purpose of the durational residency requirement, "and indeed of Pennsylvania's entire assistance program, is to encourage work and self-sufficiency over dependency," is unconvincing. Although unquestionably the encouragement of self-sufficiency and work is a laudable and legitimate state goal, the Commonwealth has not demonstrated that this is a compelling interest or that a two-tier scheme is necessary to achieve that end. Even assuming arguendo that the interest is compelling, the scheme clearly is not narrowly drawn to achieve that goal and arguably, as the district court found and as applied by the Supreme Court, is not even rationally related to that purpose.

For instance, the Commonwealth has not demonstrated why newly arrived residents are more in need of "encouragement" to join the work force than longer-term residents. If encouraging work truly were the goal, and reduced benefits during a waiting period accomplished this goal, all residents should be subject to a waiting period, not just new residents. See *Shapiro*, 394 U.S. at 637 ("A state purpose to encourage employment provides no rational basis for imposing a one-year waiting-period restriction on new residents only."). Furthermore, the scheme does not encourage all new residents but only "encourages" those new residents who arrive from states that provide lower benefits than Pennsylvania. Moreover, and significantly, immigrants from abroad receive no encouragement for under Pennsylvania law they are eligible for the same benefits as long-term residents. Additionally, the scheme's irrationality is demonstrated by its application to persons who migrated to Pennsylvania while employed, but due to no fault of their own, such as layoffs or plant closings, became unemployed within their first twelve months in the state. The law's irrationality is further highlighted as the scheme applies even to those certified by the Commonwealth as being temporarily or permanently physically disabled or otherwise incapable of working, such as the Maldonados. There simply is no rational reason, let alone a compelling reason, to assume that only new residents from states that offer lesser benefits than Pennsylvania need "encouragement" to seek work and self-sufficiency.

Amici curiae's proffered reason, that the scheme is justified by differing expectation and reliance interests – i.e., newcomers can more easily adjust to cuts in welfare

benefits through their choice of communities and lifestyles than longer-term residents who expect to have, and rely on, the safety net of higher benefits – is not sufficiently compelling. Even if we assume that many newer residents can more easily adjust their lifestyles to reduced benefits than those with longstanding ties to a particular area, an assumption that is highly speculative, the Commonwealth again has not demonstrated a compelling interest that justifies what may amount to a greater than 60% reduction in an indigent family's cash benefits required to purchase many of life's necessities.

Furthermore, the legislative scheme is not narrowly tailored to meet this purpose, as it does not take into account the myriad of differences in individual personal and financial situations. For example, most people who own homes, those who have fixed residential lease obligations, or those who have countless other longer-term financial obligations can less easily adjust to reduced benefits compared to those persons without similar obligations. The Commonwealth could use means, need-based, or other testing to determine if a particular applicant actually can adjust to reduced welfare benefits. Under any of numerous scenarios, it is likely that an eleven-month resident of Pennsylvania who unexpectedly finds herself in need of welfare benefits will find it just as difficult to survive on reduced benefits as will a twelve-month resident. Amici curiae have presented no compelling reason to assume that all newer residents, and only newer residents, are more able to easily adjust to and survive on reduced welfare benefits, nor have they demonstrated that the scheme is narrowly tailored to affect only those able to adjust to and survive on reduced

welfare benefits. Thus, it is obvious that the Commonwealth (and Amici) has failed to demonstrate that its twelve-month durational residency requirement is necessary to promote a compelling state interest, or that the legislation is narrowly drawn to meet its stated objections.

We agree with the district court that there is no constitutional right to welfare benefits, *Dandridge v. Williams*, 397 U.S. 471, 485, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970), and none is claimed. We are also aware of a state's legitimate interest in preserving public funds. When, however, a state makes welfare benefits available for its indigent, Shapiro and Maricopa County make it clear that the preservation of the public fisc may not be achieved by an invidious distinction between classes of its citizens.

We are mindful, however, as explained by the district court, that the opinions in several Supreme Court cases decided since Shapiro and Maricopa County may call into question the vitality of strict scrutiny review of laws that burden the fundamental right to interstate travel and migration. Nevertheless, the Supreme Court has periodically admonished lower federal courts, and has recently "reaffirmed its rule that 'if a precedent of th[e Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to th[e Supreme] Court the prerogative of overruling its own decisions.' " See *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997, 2017, 138 L. Ed. 2d 391 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 104 L. Ed. 2d

526, 109 S. Ct. 1917 (1989)). Because Shapiro and Maricopa County have never been overruled by the Court, we follow the Court's directive and conclude that they dictate the result of this case.[9] We note, however, that our opinion is in no way meant to pass judgment on the wisdom or desirability of the Pennsylvania legislature's attempt at welfare reform.

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[9] On appeal, the Maldonados once again argue that Section 9(5)(ii) violates the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment. As shown by the almost complete lack of citation to authority in their brief, this argument is almost completely without merit. But see *Zobel*, 457 U.S. at 71-81 (O'Connor, J. concurring) (finding the right to travel rooted in the Privileges and Immunities Clause). The Supreme Court has consistently interpreted Article IV, § 2 – the Privileges and Immunities Clause – to be a limit on the ability of a state to discriminate against out-of-state residents. The Clause, "in effect, prevents a State from discriminating against citizens of other States in favor of its own." *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 511, 83 L. Ed. 1423, 59 S. Ct. 954 (1939). As a necessary prerequisite for the Privileges and Immunities Clause to apply, it must be shown that a state discriminated against a citizen of another state. See, e.g, *United Bldg. & Constr. Trades Council v. Mayor and Council of Camden*, 465 U.S. 208, 218, 79 L. Ed. 2d 249, 104 S. Ct. 1020 (1984); *Zobel*, 457 U.S. at 59 n.5. Here, by contrast, the Pennsylvania statute is applicable only to bonafide Pennsylvania-state residents and does not discriminate against nonresidents in any way. The only way to fall under the challenged scheme is to first become a resident of the Commonwealth of Pennsylvania. Accordingly, the Privileges and Immunities Clause has no application to the issues presented by this appeal.

III.

In conclusion, we affirm the district court's order that the Maldonados have shown that they were likely to succeed in proving that Commonwealth's twelve-month durational residence requirement is unconstitutional. Thus, the court's grant of a preliminary injunction was not an abuse of discretion. We conclude, however, that the court erroneously subjected the law to rational basis analysis instead of the requisite strict scrutiny. The Commonwealth has not demonstrated that the scheme is necessary to promote a compelling state interest, or that it is narrowly tailored to accomplish its stated goal. Accordingly, we hold that Pennsylvania's two-tier durational residency requirement for welfare benefits is unconstitutional as it is based solely on a citizen's length of residing in the state; the scheme impermissibly penalizes citizens who have exercised their fundamental right to travel and migrate interstate, and thus violates the Equal Protection Clause of the Fourteenth Amendment.

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In The

Supreme Court of the United States

October Term, 1997

ELOISE ANDERSON, Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; and CRAIG L. BROWN, Director, California Department of Finance,

Petitioners,

v.

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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3 PP

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 15.8 of the rules of this Court, petitioners submit this supplemental brief to address the implications of the opinion of the Court of Appeals for the Third Circuit ("Third Circuit") in *Maldonado v. Houstoun*, No. 97-1893, 1998 WL 569359 (3d Cir. Sept 9, 1998). This opinion demonstrates the importance of the issue placed before this Court by the pending petition for writ of certiorari.

In *Maldonado*, although the Third Circuit recognized that "[r]egrettably . . . the law with respect to the constitutional implications of the right to travel is unsettled and in need of clarification," *id.* at *5, the court incorrectly applied a strict scrutiny standard of review to a two-tier durational residency requirement. Once again, a state is prevented from implementing a necessary, federally-authorized, and constitutional component of welfare reform.

Review by this Court of California's petition is necessary to prevent further fundamental errors of analysis by the judiciary. The fact that the trial court in *Maldonado* applied a rational basis standard of review to Pennsylvania's statute, and that the Third Circuit then rejected that analysis, demonstrates the necessity for guidance by this Court as to the correct standard of review.

Thus, contrary to plaintiffs' assertion that the Third Circuit's opinion "eliminates any possible basis for reviewing" the petition (Plaintiffs' Supplemental Brief in

Opposition, page 1), the opinion instead provides additional reasons to grant the pending petition. Therefore, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 98-97

In The

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October Term, 1997

ELOISE ANDERSON, Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; and CRAIG L. BROWN, Director, California Department of Finance,

Petitioners,

v.

BRENDA ROE and ANNA DOE, on behalf of themselves, and all others similarly situated,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE OF COURT TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE UNITED STATES JUSTICE FOUNDATION AND CALIFORNIA STATE SENATORS RAY HAYNES, ROB HURTT, TIM LESLIE, AND RICHARD RAINEY; AND CALIFORNIA STATE ASSEMBLY MEMBERS STEVE BALDWIN, HOWARD KALOOGIAN, BILL LEONARD, TOM McCLINTOCK, AND BERNIE RICHTER, IN SUPPORT OF PETITIONERS

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MOTION OF THE UNITED STATES JUSTICE FOUNDATION AND CALIFORNIA STATE SENATORS RAY HAYNES, ROB HURTT, TIM LESLIE, AND RICHARD RAINEY; AND CALIFORNIA STATE ASSEMBLY MEMBERS STEVE BALDWIN, HOWARD KALOOGIAN, BILL LEONARD, TOM McCLINTOCK, AND BERNIE RICHTER, FOR LEAVE OF COURT TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

I. INTERESTS OF THE *AMICI CURIAE*[1]

The United States Justice Foundation and California Legislators (the "USJF") ("*Amici*") moves pursuant to Rule 37 of the Rules of this Court for leave to file the accompanying brief as *amici curiae* in support of Petitioners. USJF sought written consent to file this brief *amici curiae* from Petitioners and Respondents. Petitioners provided written consent, which has been lodged with the Clerk of the Court. Respondents, through their Counsel, American Civil Liberties Union Foundation of Southern California, refused to give consent to filing this brief *amici curiae*.

USJF is a nonprofit corporation organized under the laws of the state of California and dedicated to the promotion of constitutional rights. Since its inception in 1979, USJF has regularly assisted individuals and classes, not only to redress individual acts of injustice, but also to promote important public policy matters affecting constitutional claims. For example, among others, USJF has

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation and submission of this brief. (Supreme Court Rule 37.6).

filed briefs *amicus curiae* in the United States Supreme Court in support of the constitutionality of California's Proposition 13 and an Arkansas state Congressional term limits law; in the California Supreme Court in opposition to claims that the state Unruh Act requires atheists to be admitted to the Boy Scouts; and in the Ninth Circuit Court of Appeals in support of the California welfare reform law at issue in this case. In addition, all three members of the Board of Directors of USJF are California residents and taxpayers, and share an interest on behalf of USJF in the stability and reform of the California welfare system.

Amici also include several members of the California Legislature who are interested in the implementation of the state welfare reform law which is at issue in this case.

USJF's active involvement in issues regarding California state government tax and spending policy enable them to provide this Court with an important perspective. In its brief, USJF addresses the challenge to Welfare and Institutions Code section 11450.03 and specifically discusses the importance of this Court resolving the issue of whether it is appropriate for lower courts to seize upon the so-called constitutional "right to travel" in welfare benefit cases to establish through the "back door" a constitutional right to welfare benefits at a particular level. USJF urges the Court to grant Petitioner's Writ of Certiorari to resolve the constitutionality of state welfare reform programs such as the one advanced by the State of California.

For the foregoing reasons, USJF respectfully requests leave of court to file this brief as *amici curiae* in support of Petitioners.

Respectfully submitted,

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Dated: July 31, 1998

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INTERESTS OF *AMICI CURIAE*

The USJF is a nonprofit corporation organized under the laws of the state of California and dedicated to the preservation of property, civil and human rights. USJF regularly assists individuals and classes, not only to redress individual acts of injustice, but also to promote important public policy matters. USJF has been active in a variety of issues since it was founded in 1979, including significant developments in the law in the fields of tax limitation and welfare reform. In addition, all three members of the Board of Directors of USJF are California residents and taxpayers, and share an interest on behalf of USJF in the stability and reform of the California welfare system.

Amici also include several members of the California Legislature who are interested in the implementation of the state welfare reform law which is at issue in this case.

USJF's active involvement in issues regarding California state government tax and spending policy enable them to provide this Court with an important perspective.

SUMMARY OF FACTS AND CASE

Amici incorporate by reference and refer the Court to the Statement of Facts as outlined in the Petition for Writ of Certiorari filed by the State of California in this matter.

SUMMARY OF ARGUMENT

Amici argue that the right the Plaintiffs seek to enforce in *Roe v. Anderson*, 134 F.3d 1400 (9th Cir., Cal. 1997) is not really a constitutional right of freedom to travel or migrate. Plaintiffs, in fact, seek to enforce a constitutional right to welfare payments at a benefit level chosen by the District Court, rather than the California Legislature. Welfare payments are not a fundamental right guaranteed by the U.S. Constitution. Similarly, and contrary to the decision of the Court of Appeals in this case, the particular benefit level of welfare assistance is not a fundamental constitutional right calling for strict scrutiny by this Court.

Decisions of this Court have left a confusing jurisprudence on the constitutional right to travel. District Courts are divided on the question of whether tiered welfare benefit levels established by state governments utilizing durational residency requirements implicate a fundamental right calling for strict scrutiny. The Writ should be granted to resolve the question of whether state durational residency requirements for welfare benefit levels implicate a fundamental right.

Amici also argue that in this case California must show only a rational basis for classification of welfare

benefit levels in order to satisfy the appropriate standard of review. However, in conducting a rational basis analysis on a tiered welfare benefit level similar to California's, a District Court in Pennsylvania is in conflict with this Court's decision in *Nordlinger v. Hahn*, 505 U.S. 1, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992), where a state classification resulting in multiple outcomes for calculation of property tax was found to satisfy the rational basis test. The Writ should be granted to allow this Court to articulate the appropriate rational basis analysis to be afforded to state durational residency requirements which result in tiered welfare benefit levels.

Further, the decision of the Ninth Circuit to affirm the District Court leaves California with no option but to break the law. If the decision stands, California's constitutional provision mandating a balanced budget is meaningless, and legitimate efforts by the executive and legislative branches of the State to establish priorities and a policy to control welfare spending will be rejected in favor of a different policy set by the judicial branch. USJF argues that welfare reform and the methods to achieve it have become so controversial that the Writ should be granted in this case, to resolve with finality the applicable standards, constitutional rights involved, and policy setting mechanisms available to State governments to control welfare spending.

ARGUMENT

I. DO TIERED WELFARE BENEFITS AND DURATIONAL RESIDENCY REQUIREMENTS IMPLICATE "FUNDAMENTAL RIGHTS?"

A. BACKGROUND

The statute at issue provides, generally, that families who have not resided in the state for 12 months will be eligible for welfare payments *at the level the family would receive in the state of prior residence*. Plaintiffs, who are eligible for these welfare payments, are not "irretrievably foreclosed" from obtaining these benefits. (*See Sosna v. Iowa*, 419 U.S. 393 (1975)). On moving to California, the Plaintiffs in the current case are immediately eligible for a particular level of benefits. After one year of residency in California, if welfare benefits are still necessary, Plaintiffs remain eligible for benefits, but at a different benefit level. In the case of these Plaintiffs, after one year of residence they would be eligible for higher welfare payments.

B. THE PLAINTIFFS DO NOT HAVE A FUNDAMENTAL RIGHT TO WELFARE PAYMENTS

There is no constitutional right to public welfare assistance, and therefore a constitutional challenge to classifications created by a state's welfare statute, standing alone, is subject to rational basis review. *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1160-61, 25 L.Ed.2d 491 (1970), rehearing denied 398 U.S. 914, 90 S.Ct. 1684, 26 L.Ed.2d 80 (1970).

C. THE PLAINTIFFS ARE ATTEMPTING TO "BOOT-STRAP" A FUNDAMENTAL RIGHT TO WELFARE BY CLAIMING THEIR "RIGHT TO TRAVEL" HAS BEEN INFRINGED

In a line of cases beginning with *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322 (1969), this Court has considered whether state durational residency requirements, including durational requirements for welfare payments, implicated the right to travel and interstate migration. Where state benefits were at issue, this Court has required the application of the compelling state interest test, rather than the rational basis test. *See Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974). (Other citations omitted).

In ruling California's durational residency benefit level law unconstitutional, the Court of Appeals and the District Court below have both adopted this Court's "right to travel" reasoning as first articulated in *Shapiro*, and have subjected the California statute to strict scrutiny analysis. *See Roe v. Anderson*, 134 F.3d 1400 (9th Cir., CA, 1997), relying on its decision in *Green v. Anderson*, 26 F.3d 95 (9th Cir., CA, 1994).

However, *Amici* argue that the result of the Court of Appeal's decision is not the protection of a constitutional right to travel. What the Plaintiffs really want is more welfare. Nevertheless, the effect of the Court of Appeal's decision is the establishment, through the "back door", of a fundamental constitutional right to welfare for Plaintiffs and their class of recipients. Confusion exists, as outlined further herein, over the appropriate standard of review in such an equal protection case. The use of strict

scrutiny by courts in such cases, where a fundamental right is alleged to be infringed, has caused a District Court to respond to one such claim that:

> "Although the general formulations by courts under the equal protection clause invite such a bootstrap argument, it is not necessary and adds nothing to the claim under the clause in the Constitution that provides the underlying "fundamental" right that is the predicate of the equal protection claim."

Panhandle Eastern Pipeline Co. v. Madison County Drainage Board, 898 F.Supp. 1302 at 1314 (1997).

Amici urge the Court to grant the Writ to resolve the question of the appropriate standard of review in these equal protection cases.

D. THIS COURT APPEARS UNCERTAIN ON WHEN DURATIONAL RESIDENCY REQUIREMENTS IMPLICATE A "FUNDAMENTAL RIGHT."

While the Court of Appeals and the District Court in the instant case have adopted the "back door" fundamental right to welfare articulated in *Shapiro*, using its "right to travel" reasoning, other decisions, including those of this Court, have created a confusing "right to travel" jurisprudence, for which the Writ should be granted.

For example, in *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972), this Court, relying on *Shapiro*, invalidated a durational residency provision requiring one-year's residence before a new resident could vote. The Court broadened *Shapiro* by rejecting any

notion that the case was limited to those where there was either an intent to deter migration or actual deterrence. However, in *Dunn*, this Court also attempted to limit the reach of *Shapiro*, explaining that a durational residency requirement would not penalize one's right to travel where the statute was not applied to that person *solely* based on that person's recent arrival in that state. *Id.* at 342 & n. 12, 92 S.Ct. at 1003 & n. 12. (Emphasis added.) In the instant case, California established that one of the reasons – if not the primary reason – the statute was applied to Plaintiffs was for purposes of economy, and not solely because they were recent arrivals. The state cited to exhaustive Federal and state administrative and legislative records supporting the need for welfare reform for budgetary purposes. (Citations omitted.) Under this Court's reasoning in *Dunn*, a District Court could have upheld the California statute, as it was not applied to Plaintiffs *solely* based on their recent arrival in the state. The Writ should be granted to provide guidance to the lower courts on whether the law of *Dunn v. Blumstein* remains applicable.

In *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975) the Court again retreated from *Shapiro*, noting that the state's interests in regulating domestic relations and protecting its divorce decrees from collateral attack was materially greater than the budgetary interests advanced in prior cases. Significantly, the Court found that the delay in divorce did not "irretrievably foreclose" persons from eventually obtaining a divorce. (*Id.*) (Citation omitted). Under this Court's reasoning in *Sosna*, a District Court could have upheld the California statute, as it does not "irretrievably foreclose" the Plaintiffs from

receiving their welfare assistance – as they are eligible for a level of assistance immediately, and another level after one year. The Writ should be granted to provide guidance to the lower courts on whether the law of *Sosna* remains applicable.

In *Zobel v. Williams*, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982) and *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 105 S.Ct. 2862, 86 L.Ed.2d 487 (1985), this Court appears to have applied an enhanced rational basis test, rather than strict scrutiny, in cases involving state statutes claimed to have violated Plaintiffs' right to travel. Subsequently, however, in *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903, 106 S.Ct. 2317, 2321, 90 L.Ed.2d 899 (1986), this Court, in a plurality opinion, resurrected *Shapiro's* "penalty" analysis to invoke strict scrutiny to strike down the state's veterans preference program favoring longer-term residents. The Writ should be granted to provide this Court the opportunity to clarify the appropriate test to be applied in the instant case.

E. LOWER COURTS ARE DIVIDED ON WHETHER DURATIONAL RESIDENCY REQUIREMENTS ESTABLISHING TIERED WELFARE BENEFIT LEVELS IMPLICATE A "FUNDAMENTAL RIGHT."

While it may be said that this Court's decisions involving right to travel cases are somewhat confusing, it is even clearer that District Courts are in actual disagreement on the matter. In *Maldonado v. Houstoun*, 177 F.R.D. 311 (USDC, E.D. Penn. 1997), a case involving a Pennsylvania statute "strikingly similar" to California's (177

F.R.D. at 317), the District Court, after considering the purposes the Pennsylvania law was enacted for, concluded that the Plaintiffs could not establish that the "primary objective" behind the ("strikingly similar") law was to deter migration. 177 F.R.D. at 330. Relying on *Shapiro* and *Soto-Lopez*, the Court stated:

> "While the Court recognizes that one of the purposes behind Section 9(5)(ii) was to discourage an influx of poor migrants into Pennsylvania, the Court simply cannot find that this was Pennsylvania's primary objective in enacting Section 9(5)(ii). Thus, strict scrutiny will not be applied based on the "primary objective" of the statute."

Id. The District Court felt the state had provided ample legislative history to support a conclusion that the primary purpose of the statute was to promote the "financial stability of Pennsylvania's welfare system," and thus required only application of a rational basis test, even though the state "candidly" admitted that a purpose of the law was to prevent the state from becoming a "welfare magnet." 177 F.R.D. at 328.

The *Maldonado* District Court's decision stands in stark contrast to the decisions of the District Court and the Court of Appeals below, which in issuing and upholding the preliminary injunction gave no consideration to the State of California's ample evidence supporting the primary purpose of the law, which is to bring financial stability to state expenditures on welfare. Once the lower courts in the instant case determined that the Plaintiffs were "penalized" by the law, they essentially

rejected consideration of any legitimate purpose offered in support of the law by the state.

Further, the *Maldonado* District Court determined that the "strikingly similar" Pennsylvania statute did not operate to penalize the Plaintiffs in that case from migration. Citing this Court's conclusion that although any durational residency requirement impinges to some extent on the right to travel, the District Court in *Maldonado* interpreted *Shapiro* as stating that such a requirement was not per se unconstitutional. This Court's holding in *Shapiro* was conditioned, 394 U.S. at 638 n. 21, 89 S.Ct. at 1333 n. 21, by the caveat that some "waiting period or residence requirements . . . may not be penalties upon the exercise of the constitutional right to interstate travel." The amount of impact required to give rise to strict scrutiny was not made clear by this Court.

Thus, what is viewed as a penalty under *Shapiro* analysis by a District Court in California is not viewed as a penalty under the same analysis in a "strikingly similar" case by a District Court in Pennsylvania. In order to provide guidance to the lower courts on the appropriate analysis, the Writ should be granted.

In *Warrick v. Snider*, 1997 WL 875695 (USDC, W.D.Pa.), another District Court in Pennsylvania, this time in the Western District, agreed with the *Maldonado* reasoning that strict scrutiny was the inappropriate standard of review in a challenge to a durational residency requirement for temporary welfare assistance where the Plaintiff made a claim of infringement of the right to travel. "I agree with Judge Newcomer. . . . Accordingly, strict scrutiny will not be applied on this basis." 1997 WL

875695, 5. Such a result is inapposite to the holding in the Court of Appeals, below.

Adding to the confusion, another District Court in Rhode Island has reached essentially the same conclusion as the Court of Appeals in *Roe v. Anderson*, finding that a durational residency requirement in a dual-tier benefit system in fact penalized the fundamental right to travel and justified application of a strict scrutiny standard. *Westenfelder v. Ferguson*, 998 F.Supp. 146 (USDC, D. Rhode Island, 1998).

Taken as a whole, the lower courts are turning out confusing and often contrary decisions in cases involving the standard of review in cases regarding durational residency requirements for welfare benefits. In cases which turn on "strikingly similar" facts, lower courts can't seem to agree on what really constitutes a penalty on travel. This is because such a determination has become so subjective under the current case law. As Chief Justice Rehnquist wrote in *Memorial Hospital v. Maricopa County*,

> "Since the Court concludes that 'some waiting period[s] may not be penalties,' one would expect to learn [how] to distinguish a waiting period which is a penalty from one which is not. *Any expense imposed on citizens crossing state lines but not on those staying put could theoretically be deemed a penalty on travel . . .* "
>
> "It seems to me that the line to be derived from our prior cases is that *some financial impositions on interstate travelers* have such indirect or inconsequential impact on travel that they *simply do*

not constitute the type of direct purposeful barriers struck down in Edwards and Shapiro."

415 U.S. 250 at 284. (Emphasis added.)

A consistent jurisprudence is necessary in these cases, and for that reason, *Amici* urge the Writ be granted.

II. IF RATIONAL BASIS IS THE APPROPRIATE TEST, WHICH ANALYSIS SHOULD THE COURTS APPLY IN WELFARE CASES?

A. DISPARITIES ARE CONSTITUTIONAL WHERE THERE IS A PLAUSIBLE REASON FOR THE CLASSIFICATION

Disparities are constitutional where a plausible reason exists. Social welfare or public assistance legislation runs afoul of the equal protection clause only if it cannot be said to relate rationally to a legitimate state objective. *Baker v. City of Concord*, 916 F.2d 744, 747, 748 (1st Cir. 1990).

This Court has upheld the implementation of a program which imposed a "grant limit" regardless of the size of the family or the standard of need. *See Dandridge v. Williams*, 397 U.S. 471 (1970). In *Dandridge*, Justice Stewart, in writing for the majority stated, "[H]ere we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the 14th Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families." *Dandridge v. Williams*, 397 U.S. 471 at 484.

Dandridge thus articulates a point at issue in the current case: whether a disparity in payments must implicate a constitutional right. In *Dandridge*, the Supreme Court found that such disparities were constitutionally permissible under equal protection analysis. The District Court in the instant case instead chose to focus on the alleged state interference with the freedom of interstate travel. *Amici* argue that what is at issue, however, is the state economic regulation and not any constitutional right.

B. THE STANDARD SHOULD BE DEFERENTIAL

In applying the Equal Protection Clause, the role of the courts in reviewing legislation is generally a deferential one; courts do not second-guess the wisdom or efficiency of state action, but merely seek to insure its rationality. *Dandridge v. Williams*, 397 U.S. 471, 485-86, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). Similarly, the Supreme Court has stated that "[I]n structuring internal taxation schemes, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Williams v. Vermont*, 472 U.S. 14, 22, 105 S.Ct. 2465, 2471, 86 L.Ed.2d 11 (1985), quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359, 93 S.Ct. 1001, 1003, 35 L.Ed.2d 351 (1973).

Although Welfare and Institutions Code Section 11450.03 is not a tax statute, if it is struck down such action will directly implicate the state budget. Since California is required by the California Constitution to

balance its budget,[2] *Amici* submits that while the statute is not strictly a tax measure, it is nevertheless so necessarily intertwined with state revenue policy as to raise it to the level of broad deference articulated in *Williams* and *Lehnhausen, infra.*

C. COURTS ARE DIVIDED IN THEIR ANALYSIS USING THE RATIONAL BASIS TEST

In any event, District Courts have determined that even under rational basis analysis, tiered durational residency benefits are unconstitutional.

> "Although the Supreme Court has stated that encouraging employment is a legitimate government purpose, the Court has also expressly held that a one-year waiting period that is justified as a means of encouraging new residents to seek and obtain employment sooner "provides no rational basis for imposing a one-year waiting period restriction on new residents only." *Id.* at 637-38, 89 S.Ct. at 1333. Thus, under binding Supreme Court precedent, Section 9(5)(ii)'s one year waiting period simply cannot be justified by claiming that it encourages newcomers to work because it simply is not rationally related to this purpose."

Maldonado, 177 F.R.D. at 332. *See also Warrick v. Snider, supra.*

Yet such an application of equal protection analysis runs contrary to this Court's decision in *Nordlinger v. Hahn, supra,* in which a California property tax scheme

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[2] California Constitution Article IV, § 12(a).

resulting in dramatic financial disparities between similarly situated individuals was upheld by the Court. In *Nordlinger,* this Court's review of the record found that:

> "New owners and old owners are treated differently with respect to one factor only – the basis on which their property is initially assessed. Petitioner's true complaint is that the State has denied her – a new owner – the benefit of the same assessment value that her neighbors – older owners – enjoy."

Nordlinger, 112 S.Ct. at 2333.

In *Nordlinger,* this Court restated the applicable law of rational basis analysis in equal protection claims: that the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification (112 S.Ct. at 2332); that disparities in benefits are constitutional for equal protection purposes where such policies serve to fulfill "the legitimate expectation and reliance interests" of those receiving the benefits (112 S.Ct. at 2333), citing to *Kadrmas v. Dickinson Public Schools,* 487 U.S. 450, 108 S.Ct. 2481, 101 L.Ed.2d 399 (1988) and *United States Railroad Retirement Bd. v. Fritz,* 449 U.S. 166, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980); and that a legislature need not even articulate a purpose or rationale supporting the classification to pass constitutional muster under the Equal Protection Clause (112 S.Ct. at 2334).

Common sense dictates that a newcomer to California does not have a legitimate reliance and expectation interest to immediately receive welfare benefits at a level higher than received in the prior state of residence. Nevertheless, courts are divided on their rational basis analysis in such cases, and for that reason the Writ should be

granted to provide new, clear guidance to the lower courts.

CONCLUSION

For the foregoing reasons, this Court should grant Petitioner's Writ of Certiorari.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1997

ELOISE ANDERSON, Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; and CRAIG L. BROWN, Director, California Department of Finance,
Petitioners,

v.

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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28 pp

QUESTION PRESENTED

Does a trial court abuse its discretion by subjecting to strict scrutiny a federally authorized statute which does not penalize any fundamental right, and which merely limits a new resident's welfare benefits to the level of benefits received or receivable in the state of prior residence for a period of one year?

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IDENTITY AND INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioners Eloise Anderson, *et al.*[1] Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the welfare reform arena will provide an additional viewpoint with respect to the issues presented. PLF has participated in numerous other cases before this Court including the previous incarnation of this case, *Anderson v. Green*, 513 U.S. 922 (1994), as well as other welfare reform cases such as *Lascaris v. Shirley*, 420 U.S. 730 (1975), and *Geduldig v. Aiello*, 417 U.S. 484 (1974).

PLF believes that temporary, nondrastic restrictions on welfare benefits distributed to residents within their first year of arrival in a state do not violate the constitutional right to travel. The absolutist equal protection analysis of *Shapiro v. Thompson*, 394 U.S. 618 (1969), and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), need not, and should not, control the outcome of this litigation. This Court's decisions have followed a trend away from the analysis in those two cases and, in fact, that analysis has been unable to command a majority of this Court since 1974, a scant five years after it was introduced. Nonetheless, since Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act (welfare reform act),

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Public Law No. 104-193, 42 U.S.C. §§ 601-1788, specifically authorizing durational residency requirements for the receipt of a state's highest level of welfare benefits, several lower courts, including the Ninth Circuit in this case, have used *Shapiro* to strike down such requirements. PLF argues that this Court should grant certiorari in this case to provide guidance to the lower courts as to the applicability of the right to travel doctrine to differences in the levels of welfare benefits provided to recent immigrants to a state.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in this case is published at 134 F.3d 1400 (9th Cir. 1998).

STATEMENT OF FACTS

In 1996, Congress passed and the President signed the welfare reform act. Among other provisions, the welfare reform act replaced the Aid to Families with Dependent Children entitlement with Temporary Assistance for Needy Families and eliminated national eligibility standards. Temporary Assistance for Needy Families, the backbone of the welfare reform act, replaced the open-ended federal financial liability of Aid to Families with Dependent Children with a finite state block grant. Hoke, *State Discretion Under New Federal Welfare Legislation*, 9 Stan. L. & Pol'y Rev. 115, 116 (1998) (*State Discretion*). By providing federal financial assistance in the form of a block grant (instead of individual, program-specific authorizations), Temporary Assistance to Needy Families gives states broad authority to design and implement their own welfare systems. The welfare reform act thus creates a decentralized program that returns to the states the authority to administer welfare programs in a way that best suit their recipients' needs, while remaining true to the national goals of providing assistance to needy families and ending dependency. The welfare reform act

authorizes states to hold welfare benefit levels granted to new residents to the amount they would have received in their state of prior residence. 42 U.S.C. § 604(c).

Following enactment of the welfare reform act, California resurrected Welfare and Institutions Code § 11450.03:[2]

> (a) Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.

Two applicants for California welfare benefits, representing a certified class of all new residents to California, challenged this statute as violating the right to travel under the United States Constitution. Appendix to Petition for Writ of Certiorari (App.) 2, 7. The applicants remained *eligibile* to receive welfare benefits, but Section 11450.03 rendered the *level* of their benefits less than those received by California residents of more than one year. App. 7. On a motion for preliminary injunction, the district court relied on its previous ruling in *Green v. Anderson* and found the statute to be unconstitutional. App. 14-15. The court therefore granted the preliminary injunction. App. 31. The state appealed, and the Ninth Circuit Court of Appeals affirmed. App. 2.

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[2] Welfare and Institutions Code § 11450.03 was the subject of previous litigation prior to enactment of the welfare reform act. The federal district court and Ninth Circuit Court of Appeals struck down the statute as violating the right to travel (*Green v. Anderson*, 26 F.3d 95 (9th Cir. 1994)), and this Court granted review of the case and vacated the Ninth Circuit decision. However, the case was dismissed when the federal waiver to enact the durational residency requirement was withdrawn. *Anderson v. Green*, 513 U.S. 922.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1 lists among the considerations governing review on certiorari the circumstance when a lower court has decided a question of federal law in conflict with decisions of this Court or decided an important question of federal law that has not been, but should be, settled by this Court. As shown below, the issues decided by the Ninth Circuit Court of Appeals in this case are both in conflict with rulings of this Court and of the utmost national importance that requires prompt guidance from this Court. Amicus Curiae Pacific Legal Foundation urges this Court to grant the petition for writ of certiorari sought by Eloise Anderson, the Director of the California Department of Social Services, *et al.*, in this case.

ARGUMENT

I

THIS CASE CONFLICTS WITH RULINGS OF THIS COURT

Shapiro v. Thompson is the hook on which the court below hung its hat.[3] *Shapiro* invalidated a one-year residency requirement imposed before *any* welfare benefits could be collected because the Court found no compelling state interest capable of justifying the requirement. *Shapiro*, 394 U.S. at 642. Among the state interests the Court found admittedly permissible but noncompelling were (1) discouraging the influx

[3] The district court opinion in this case adopted its previous decision in *Green v. Anderson* by reference. App. 26-27. The Ninth Circuit similarly relied on its decision in *Green* affirming the lower court opinion as persuasive authority. App. 8-9. Thus, although the court below stated that it was avoiding a decision of this case on the merits (App. 12), its decision relying on *Green* and upholding the district court's analysis that plaintiffs would probably prevail on the merits has the same effect as a straightforward decision on the merits.

of poor families; (2) facilitating the planning of the welfare budget; (3) providing an objective test of residency; (4) minimizing the opportunity for recipients to receive payments fraudulently from more than one jurisdiction; and (5) encouraging early entry of new residents into the labor force. *Id.* at 631-32, 634. The Court held that constitutional concepts require that all citizens "be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Id.* at 629. This is undoubtedly true.

Yet, the Court did not analyze the statutes at issue in the light of an "unreasonable burden or restriction." Rather, it invoked the usually fatal strict scrutiny. The Court viewed a state's responsibility to maintain a healthy fiscal policy with an attitude approaching scorn. *Shapiro*, 394 U.S. at 633. Perhaps in 1969, the states simply did not face the fiscal crises that are now so often commonplace, particularly in California. *See* Declaration of Dennis Hordyk, App. 44-45. Justice Harlan, in dissent, immediately foresaw the problems with this analysis and said that when a statute affects only matters not mentioned in the Constitution, and is not arbitrary or irrational, the court is not entitled to pick out particular human activities, characterize them as "fundamental," and give them added protection under an unusually stringent equal protection test. *Shapiro*, 394 U.S. at 662 (Harlan, J., dissenting). Justice Harlan also recognized the long-range implications of the decision:

> [T]he field of welfare assistance is one in which there is a widely recognized need for fresh solutions and consequently for experimentation. Invalidation of welfare residence requirements might have the unfortunate consequence of discouraging the Federal and State Governments from establishing unusually generous welfare programs in particular areas on an experimental basis, because of fears that the program would cause an influx of persons seeking higher welfare payments.

Id. at 674-75 (Harlan, J., dissenting). In California, the state government expanded its public assistance levels to extremely generous proportions when the state was experiencing a "boom" in population and economic growth. By fiscal year 1996-97, California had the sixth highest grant level in the United States and the highest grant level of the ten most populous states. Declaration of Bruce Wagstaff, App. 36. With the inevitable recession that followed the expansion, California sought to cut back its more profligate spending in ways to harm the fewest people as possible. *Id.* at App. 37 (charting reduction of expenditures). The decision below effectively prevents California from controlling its own welfare budget.

As shown above, *Shapiro*, standing alone, promised catestrophic effects on states' abilities to determine their own welfare policies. Unfortunately, *Shapiro* was quickly followed by two other cases that placed the strict scrutiny straightjacket on states' policymaking functions. In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Court noted the specific language in *Shapiro* that the decision did not purport to decide whether durational residence requirements could be used to determine voting eligibility (*Shapiro*, 394 U.S. at 638 n.21). Nonetheless, the Court found that a law requiring one year of state residence and three months of county residence before registering to vote *penalized* the right to travel by forcing a person who wishes to travel and change residences to choose between travel and the basic right to vote. *Dunn*, 405 U.S. at 342. *Dunn*, too, emphasized strict scrutiny as the measure of the constitutionality of the law. *Id.* at 343. Despite the Court's disclaimer that it was not "secretly requir[ing] the impossible,"[4] given the strict analysis, the unsurprising result was an invalidated statute. *Id.* at 360.

[4] In dissent, Chief Justice Burger refuted this statement, arguing that "no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection." *Dunn*, 405 U.S. at 363-64 (Burger, C.J., dissenting).

Memorial Hospital v. Maricopa County further expanded the *Shapiro* analysis. That case struck down a statute which prohibited residents of less than 12 months duration from receiving publicly funded nonemergency medical care. *Memorial Hospital*, 415 U.S. at 254. The Court held that the statute penalized interstate travel because medical care is as much "'a basic necessity of life'" to an indigent as the welfare assistance in *Shapiro*. *Id.* at 259. The Court found that the right of interstate travel must be seen as ensuring new residents the same right to vital government benefits and privileges in the states to which they migrate as are enjoyed by other residents. *Id.* at 261. The Court applied strict scrutiny and struck down the statute. *Id.* at 269-70. One of the more bizarre threads that bind *Shapiro*, *Dunn*, and *Memorial Hospital* is the notion that no evidence need exist that any person was actually deterred from traveling by the challenged restrictions. *Shapiro*, 394 U.S. at 650 (Warren, C.J., dissenting); *Dunn*, 405 U.S. at 340; *Memorial Hospital*, 415 U.S. at 257-58. This admitted lack of deterrence should, at the very least, call into question whether the "right to travel" has been implicated at all. After all, if the whole point of the amorphous right to travel is to permit citizens of the United States to move freely throughout the country, the fact that the complainants in all of these cases *did*, in fact, move where they wanted to move, should have significant bearing on the analysis.

The *Shapiro* line of cases has been distinguished on a number of bases by this Court. As early as 1975, the Court had distinguished *Shapiro* and *Memorial Hospital* in a durational residency case. In *Sosna v. Iowa*, 419 U.S. 393 (1975), the Court upheld an Iowa statute which required one year of continuous residence in Iowa before a petition for divorce against a nonresident could be filed. *Sosna*, 419 U.S. at 395. The Court distinguished *Shapiro*, *Dunn*, and *Memorial Hospital* with the observation that "the durational residency requirements they struck down were justified on the basis of budgetary or

recordkeeping considerations." *Sosna*, 419 U.S. at 406. Iowa's state interest was to ensure recognition of its divorce decrees by other states under the Full Faith and Credit Clause of the Constitution. This was considered a more potent state interest than fiscal matters. The Court upheld the statute without specifying a standard of review. The opinion balanced the state interest in favor of the statute against the burden on the right to travel, concluding that the former outweighed the latter. *Id.* at 406, 409-10. The Court emphasized that the gravamen of Sosna's claim was not a *total deprivation*, but only delay. *Id.* at 410. This same statement distinguishes this case from *Shapiro*, *Memorial Hospital*, and *Dunn*. In each of the earlier cases, the claimant was *totally* cut off from welfare benefits, nonemergency medical care, or voter registration. In this case, the statute only *partially* restricts welfare payments for a limited time.

Sosna threw considerable doubt on the viability of the *Shapiro* line of cases.[5] Justice Marshall, in dissent, said the majority opinion "departs sharply" from *Shapiro*, substituting an "*ad hoc* balancing test" for strict scrutiny. *Sosna*, 419 U.S. at 418-19 (Marshall, J., dissenting). *Joseph v. City of Birmingham*, 510 F. Supp. 1319, 1335 n.23 (E.D. Mich. 1981) (upholding one-year residency requirement for candidates for municipal office) interpreted *Sosna* as foreshadowing possible abandonment of *Shapiro's* invocation of strict scrutiny based on the notion that migrating welfare recipients would find their new state less attractive and were thus "penalized" by their voluntary move. Moreover, *Joseph* favored the balancing test used in *Sosna*, noting the particular factors to take into account: (1) the importance of the benefit withheld from recently arrived residents (this includes both the severity of the effects on the lives of these recently arrived residents who are denied the benefit and the constitutional stature of the benefit itself); (2) the

[5] *See also Vlandis v. Kline*, 412 U.S. 441, 452-54 (1973) (upholding waiting period for resident tuition at state universities).

extent of the interference with interstate travel (*i.e.*, the actual likelihood of deterring such travel); (3) the legislative intent; and (4) the governmental interests fostered by the law. *Joseph*, 510 F. Supp. at 1335 n.23. These four factors were derived from Justice Harlan's dissent in *Shapiro* (*Shapiro*, 394 U.S. at 663, 671 (Harlan, J., dissenting)) which apparently formed the basis of the majority *Sosna* opinion. *Sosna*, 419 U.S. at 406-09 (majority); 419 (Marshall, J., dissenting).

Applying neither the *Shapiro* strict scrutiny analysis nor the *Sosna* balancing test, *Zobel v. Williams*, 457 U.S. 55 (1982), invalidated an Alaska law allocating oil reserve dividends in amounts based on the length of each citizen's residence (*id.* at 57, 65) under the rational basis test without reaching the question of whether the program penalized the exercise of the right to travel. *Id.* at 60-61, 65. This Court found that rewarding citizens for past contributions was not a legitimate state purpose. *Id.* at 63. The Court distinguished the *Shapiro* line of cases because the Alaska statute did not impose any threshold waiting period before receiving benefits; rather, it created "fixed, *permanent* distinctions" between all residents of Alaska, depending on how long they have been in the state. *Id.* at 59 (emphasis added). *Zobel* is more notable for Justice O'Connor's concurrence using a very different analysis. Justice O'Connor suggests an approach based on the Privileges and Immunities Clause of Article IV of the Constitution. *Id.* at 74-78 (O'Connor, J., concurring). She argued that a statute must satisfy a two-part test if it burdens a nonresident or new resident who seeks to engage in an essential activity or exercise a basic right. *Id.* at 76. First, there must be something to indicate that noncitizens constitute a peculiar source of the evil at which the statute is aimed. *Id.* Second, the Court must find a substantial relationship between the evil and the discrimination practiced against the noncitizen. *Id.* Applying this test, Justice O'Connor found that even if new residents were a peculiar source of the "evil" of "partaking in current largesse without having made

prior contributions," *id.* at 77, a contention Justice O'Connor found unpersuasive, the cure does not bear a substantial relationship to the malady because some people who migrated to Alaska may have contributed significantly more to the state, both before and after their arrival, than have some natives. *Id.* at 78.

In *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986), the Court held that a New York state limit on civil service veterans' preference to only those veterans who were residents of the state when they entered military service is unconstitutional. The case generated several opinions. Only four justices (Brennan, Marshall, Blackmun, and Powell) held that the right to travel was violated. The analysis in *Soto-Lopez* concentrated on the fact that the immigrant veterans were *permanently* barred from receiving civil service bonus points. *Id.* at 909. The plurality opinion found a "guiding principle" to tie together the various analyses described above: the right to migrate protects residents of a state from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from other similarly situated residents. *Id.* at 904. That said, however, the plurality promptly "inferred" a penalty on interstate migration in *Zobel* and *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), and returned to strict scrutiny review. *Id.* at 908.

Justice O'Connor, in dissent, strongly chastised this maneuver, noting that

> "the plurality simply rejects the equal protection approach the Court has previously employed in similar cases [*e.g., Hooper*], without bothering to explain why its novel use of both 'right to migrate' analysis and strict equal protection scrutiny is more appropriate, necessary or doctrinally coherent."

Id. at 919 (citations omitted) (O'Connor, J., dissenting). Note also, that this case elevates public employment to the same level as the "necessities of life" analyzed in *Shapiro* and *Memorial Hospital*. Chief Justice Burger, who provided the fifth vote in *Soto-Lopez*, would not have reached the right to travel issue at all because the case could have been resolved on straight equal protection grounds. *Id.* at 912-13 (Burger, C.J., concurring in the judgment). Thus, strict scrutiny for right to travel issues has not been accepted by a majority of this Court since *Memorial Hospital* in 1974.

In *Soto-Lopez*, Justice O'Connor's dissent (joined by Justices Rehnquist and Stevens) was based on her analysis of the Privileges and Immunities Clause. *Id.* at 920 (O'Connor, J., dissenting). Finding any impact on the right to travel to be "ephemeral," Justice O'Connor used only the rational basis standard, which the law withstood. *Id.* at 924 (O'Connor, J., dissenting). As one commentator noted, *Soto-Lopez* leaves lower courts with little guidance in right to travel cases. Zubler, *The Right to Migrate and Welfare Reform: Time for Shapiro v. Thompson to Take a Hike*, 31 Val. U. L. Rev. 893, 906-07 (1997) (Zubler) (noting that only four justices, none of whom are currently on this Court, invoked *Shapiro* in its pure form; the two justices who followed *Zobel's* enhanced rational basis have also left the Court, and the three remaining justices sought to divorce the right to travel from Equal Protection and analyze it under the Article IV Privileges and Immunities Clause; as such, "this area of jurisprudence is obviously unstable, and it appears ripe for both clarification and fundamental correction").

The winding path of the "right to travel" doctrine demonstrated by the cases analyzed above has almost necessarily resulted in disarray among the lower courts deciding cases based on this doctrine. Part of the problem appears to be a failure to grasp where the path begins, e.g., from where in the Constitution the right to travel is derived. Without a clear understanding of the context in which the right to travel arises, lower courts simply pick and choose among a variety of analyses based on any one of several possible constitutional doctrines. Such

haphazard analyses can only be remedied by this Court's review and guidance.

II

WELFARE BENEFITS CASES DECIDED IN THE SAME TIME PERIOD AS *SHAPIRO* UNDERCUT *SHAPIRO'S* ABSOLUTIST ANALYSIS

Citizens have no constitutional right to welfare benefits. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33 (1973). Thus, it is instructive to overlay the cases in which welfare benefits are constitutionally denied, in whole or in part, with the cases that purport to straightjacket the way states distribute welfare benefits among their populations. However, the court below made no attempt to reconcile this line of cases with its decision that any distinction in the level of welfare benefits must be subjected to strict scrutiny.

Dandridge v. Williams, 397 U.S. 471 (1970), upheld a Maryland regulation which resulted in some disparity in payments to the largest Aid to Families with Dependent Children (AFDC) families against a challenge that the regulation violated the Equal Protection Clause. The Court established the following test:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." . . . "The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific." "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Id. at 485 (citations omitted). The Court recognized that public assistance programs may give rise to inequalities in their design and administration and nonetheless ruled: "But the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination." *Id.* at 486-87 (citations omitted). The Court explicitly stated that it was not ruling that the Maryland policy before it was wise or best fulfilled the relevant social and economic objectives that the state might ideally espouse, nor that it was the most humane and just system that could be devised.

> But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

Id. at 487 (citations omitted). *Memorial Hospital*, 415 U.S. at 262 n.21, distinguishes *Dandridge* on the basis that the classification in *Dandridge* did not impinge upon a fundamental right. *See Graham v. Richardson*, 403 U.S. 365, 376 (1971). Yet, in *Memorial Hospital*, 415 U.S. at 279 (Rehnquist, J., dissenting), Justice Rehnquist pointed out the potential race to the bottom that could result as an unintended consequence from the Court's opinion. *See also* Zubler at 933-38 (logical result of *Shapiro* and its progeny is that each state will avoid having more generous benefits that any other state to avoid (1) being a welfare magnet and (2) running into constitutional problems created by *Shapiro*'s application of strict scrutiny to all disparaties in benefits). Thus, on the one hand, the Court says

it will resist the temptation to become a superlegislature and allow the states to make the public assistance decisions; while on the other hand, the *Shapiro* line of cases severely curtails the options available to the states. *Id.* at 287 (Rehnquist, J., dissenting).

In *Jefferson v. Hackney*, 406 U.S. 535 (1972), this Court upheld the Texas policy of providing a lower percentage of the state's total pool of welfare benefits to families with dependent children than was provided to aged, blind, or disabled adult recipients, which was attacked as violating the Equal Protection Clause. Applying traditional rational basis analysis, the Court held that the disparities were neither irrational nor invidious. *Id.* at 547. Moreover, state legislatures are permitted to address an issue one step at a time without necessarily running afoul of the constitution: "[T]he legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them." *Id.* at 546-47 (citation omitted). This Court in *Jefferson* specifically addressed the question of providing a lower percentage of payment to certain classes of recipients.

> Since budgetary constraints do not allow the payment of the full standard of need for all welfare recipients, the State may have concluded that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living . . . . Whether or not one agrees with this state determination, there is nothing in the Constitution that forbids it.

Id. at 548-49. By analogy, it is not irrational to believe that new residents are not disadvantaged by receiving the same amount of AFDC benefits as they would have received in their original state of residence (as well as additional California benefits that may or may not have had counterparts in the original state). *See*

Wagstaff Declaration at App. 38 (new residents may be eligible for a Special Needs Allowance for homeless assistance, full Medicaid benefits, and food stamps). The statute at issue in this case does not place immigrants to California in the position the Court believed they possibly faced in *Shapiro*--either stay where they were or starve. This statute maintains the level of benefits the recipients received at their former residence and also places no restrictions on receipt of non-AFDC benefits. This Court should grant certiorari to clarify whether (and to what extent) the right to travel doctrine exists in the context of state welfare benefits.

III

LOWER COURTS' WIDELY VARYING ANALYSES DEMONSTRATE THE NEED FOR GUIDANCE FROM THIS COURT

Congress' enactment of the welfare reform act prompted many states to implement the durational residency requirements specifically authorized by that legislation. Federal courts have subsequently been struggling with this Court's *Shapiro* line of cases . . . and coming to very different results.

In *Hicks v. Peters*, 1998 WL 424176 (N.D. Ill. 1998), the district court considered a challenge to Illinois' durational residency requirement, which, like California's, restricts first year residents to the benefit levels they would have received in their state of prior residence. The *Hicks* court dodged the issue of what level of scrutiny to apply to the challenge. Instead, the court found that the Illinois statute failed rational basis review under the Equal Protection analysis applied in *Zobel* because the statute's only stated purpose was to encourage self-sufficiency and end welfare dependency, and because it did not distinguish between in-state and out-of-state residents. *Id.* at *3. In dicta, however, the court added that it would also find that the Illinois durational residency requirement did not impose a penalty on the

right to travel. *Id.* The court reasoned that Hicks does receive some state benefit payments and receives the same amount that she had been receiving in Alabama before she moved to Illinois.

The court in *Maldonado v. Houstoun*, 177 F.R.D. 311, 329-30 (E.D. Pa. 1997), struck down a state statute that capped welfare benefits at a recipient's former state's levels. The district court applied its interpretation of right-to-travel jurisprudence and held that the plaintiffs could not show that the primary objective of Pennsylvania's residency requirement was to deter migration, that the statute actually deterred such travel, or that it used a classification that penalized the right to travel. Because plaintiffs proved none of these three elements, the court applied rational basis review to the Pennsylvania statute and found that it was not rationally related to its only legitimate governmental purpose of encouraging self-reliance over reliance on welfare. *Id.* at 332-33. Citing *Shapiro*, the court reasoned that the residency requirement "failed miserably" at promoting self-sufficiency. *Id.* at 332. To be rationally related the court reasoned that "logic would also require a similar waiting period for long term residents" and a standard amount that all out of state and non-American citizens ought to receive. *Id. See also Warrick v. Snider*, 1997 WL 875695 (W.D. Pa. 1997) (relying heavily on *Maldonado* to strike down a 60 day durational residency requirement for cash assistance as failing both strict scrutiny and rational basis review).

In *Westenfelder v. Ferguson*, 998 F. Supp. 146, 1998 WL 127877 (D.R.I. 1998), the district court struck down a state law that reduced welfare benefit levels by 30% for all residents who resided in Rhode Island less than 12 months. The court found that the law constituted a penalty, and therefore triggered strict scrutiny, because it "denie[d] the plaintiffs' benefits needed to

ensure their ability to procure basic necessities of life." *Id.* at *6. It also held that the only relevant comparison was newly arrived residents to long-time residents, and that reduction versus complete denial (as in *Shapiro*) did not create a material difference. The district court went on to find that Rhode Island failed to demonstrate how a durational residency requirement was narrowly tailored to ending dependence on welfare, nor would it likely pass even rational basis review.

Even before passage of the welfare reform act, the Wisconsin Supreme Court found *Shapiro* unpersuasive. In *Jones v. Milwaukee County*, 168 Wis. 2d 892, 485 N.W.2d 21 (1992), the Wisconsin Supreme Court upheld a state statute which required 60 days residence to be eligible for general relief. The court addressed *Shapiro* and *Memorial Hospital's* "penalty" analysis, but held that 60 days without welfare is substantially less onerous than a one year deprivation; the minimal deprivation did not amount to a penalty on right to travel. *Id.* at 25-26. The court focused on numerous state interests. The court found legitimate interests, *inter alia*, in preserving the public fisc, conserving scarce taxpayer funds in upholding the law, and not encouraging "'those who would precipitously alter their situation in life without giving any thought to whether there is any reasonable prospect that they will be able to support themselves.'" *Id.* at 26. The *Jones* court relied in part in *Dandridge v. Williams*, 397 U.S. 471, which established that welfare eligibility requirements did not penalize the right to travel.

Lower courts' inconsistency in applying a standard of review to the durational residency requirements approved by the welfare reform act has left this very important area of the law in disarray. This Court should grant certiorari in this case to promptly provide guidance to the lower courts in addressing this recurring issue.

IV

RULES OF STARE DECISIS AND PRECEDENT DO NOT PREVENT THE SUBSTANTIAL NARROWING OR OVERRULING OF THE *SHAPIRO* LINE OF CASES

This Court has always acknowledged a power in constitutional questions--great or small--to revisit its past decisions, and modify or abandon them altogether. *See Brown v. Board of Education*, 347 U.S. 483 (1954), *overruling Plessy v. Ferguson*, 163 U.S. 537 (1896); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), *overruling Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). *Cf. Graves v. People of the State of New York*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring) (stating that "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it").

Stare decisis is not authoritative when the precedent has proven "'unsound in principle and unworkable in practice.'" *Webster v. Reproductive Health Services*, 492 U.S. 490, 518 (1989). The Court "has not hesitated to overrule decisions, or even whole lines of cases, where experience, scholarship, and reflection demonstrated that their fundamental premises were not to be found in the Constitution." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 779 (1986) (Stevens, J., concurring). Moreover, the effect of stare decisis is limited in closely divided cases, or in cases in which there were vigorous dissenting opinions. *Payne v. Tennessee*, 501 U.S. 808, 828-29 (1991) (noting prior precedent could be overruled because they "were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions").

In this case, the lower courts' reliance on *Shapiro* and *Memorial Hospital* was unwarranted. The *Shapiro* line of cases

temporarily elevated the right to travel to strict scrutiny analysis despite the lack of definition of the "right to travel" in the Constitution and despite other cases explicitly holding that states may be left to their own devises to determine the level of welfare benefits available to their citizens. This Court has not actually followed the reasoning of these cases since 1974, yet obviously some lower courts, including the court below, still feel constrained by them. Without clear guidance from this Court, lower courts hesitate to issue opinions they may view as contrary to Supreme Court jurisprudence. The *Shapiro* court itself noted that its decision bucked literally centuries of English and American tradition. *Shapiro*, 394 U.S. at 628 n.7 (noting that waiting period requirements date back at least to the English Law of Settlement and Removal of 1662). Moreover, Congress and 46 state legislatures had chosen to implement residency requirements for receipt of public assistance. *Shapiro*, 394 U.S. at 676 (Harlan, J., dissenting). The tremendous impact of the *Shapiro* line of cases in terms of the number of statutes it invalidated is still being felt today.

This case gives this Court the opportunity to choose one of the many tests applied to right to travel issues, and assert its primacy over the others.

CONCLUSION

Review by this Court is necessary to resolve this recurring question of national importance. Because the application of absolutist strict scrutiny to right to travel issues is grounded neither in the Constitution nor followed by a majority of this Court since 1974, the *Shapiro* and *Memorial Hospital* cases should not control the outcome of a temporary, partial reduction in welfare benefits, especially where such reductions are expressly authorized by Congress. For the reasons described

above, amicus curiae respectfully requests this Court to grant the petition for writ of certiorari sought in this case.

DATED: August, 1998.

Respectfully submitted,

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No. 98-97

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ELOISE ANDERSON, California Department of Social Services, *et al.*,
Petitioners,

v.

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, U.S. REP. JOHN DOOLITTLE, CALIF. SENS. RICHARD MOUNTJOY AND MAURICE JOHANNESSEN, AND CALIFORNIA ASSEMBLYMAN BILL MORROW AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the rules of this Court, the Washington Legal Foundation (WLF), *et al.*, respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioners. Petitioners have consented to the filing of this brief; a copy of the letter of consent has been lodged with the Clerk of the Court. This motion has been made necessary by the refusal of Respondents' counsel to provide consent.

WLF is a nonprofit public interest law and policy center with supporters in all 50 states, including many in California. While WLF engages in litigation in a wide variety of areas, WLF devotes a substantial portion of its resources to issues involving the interests of voters and taxpayers and efforts to ensure the prudent expenditure of tax dollars. Toward that end, WLF has participated in numerous cases in this and other federal and state courts in cases involving the administration of social service programs. *See, e.g., C.K. v. New Jersey Dep't of Health and Human Services,* 92 F.3d 171 (3d Cir. 1996). WLF filed a brief in this case when it was before the U.S. Court of Appeals for the Ninth Circuit. WLF also participated in a predecessor to this case when the prior case was before this Court; WLF filed briefs both in support of the certiorari petition and on the merits. *Anderson v. Green,* 513 U.S. 557 (1995).

The Allied Educational Foundation is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Rep. John Doolittle is a Member of the the U.S. House of Representatives; Sens. Richard L. Mountjoy and K. Maurice Johannessen are Members of the California Senate; Assemblyman Bill Morrow is a Member of the California Assembly. All strongly support California's position in this case.

Amici believe that the ruling below unnecessarily and detrimentally limits California's ability to carry out the budget cuts that have been made necessary by its fiscal

difficulties. *Amici* do not believe that it is the proper role for the federal courts to micromanage public assistance programs, particularly where (as here) the challenged program serves rational state policy objectives.

Amici have no direct interest in the outcome of this case, other than an interest in providing California and other States with the flexibility necessary to determine their own spending priorities and thus to best meet the need of all of their residents. Accordingly, *amici* believe that they bring to the case a perspective that differs from that of any of the parties, and that their brief will assist the Court in deciding whether to grant the Petition.

For the foregoing reasons, *amici* respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

Whether a federally-authorized State statute that establishes a reduced level of public assistance benefits during the recipient's first 12 months of residence in the State is subject to heightened scrutiny under the Equal Protection Clause, where the benefit level is no lower than the benefits the recipient would have received in his/her former State of residence.

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INTERESTS OF THE *AMICI CURIAE*

The interests of the *amici curiae* are set forth in the Motion for Leave to File Brief, which accompanies this brief.[1]

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Facts contained in the Petition for a Writ of Certiorari.

In brief, this suit is a challenge to the constitutionality of California Welfare and Institutions Code § 11450.03, which specifies public assistance benefits to be provided to families that have recently arrived in California.[2] Adopted at a time of fiscal crisis and in response to strong public demand for reduction in overall welfare expenditures, § 11450.03 is part of the state legislature's larger effort to ensure that the state's diminished public assistance resources are distributed as equitably as possible. Section 11450.03 provides that an eligible family arriving in California from another state shall, during its first 12

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

[2] Section 11450.03 provides in relevant part:

> (a) Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.

months of residence, receive as benefits the lesser of: (1) the benefit level available to similarly situated, long-term California residents; or (2) the benefit level the family would have been eligible to receive in their prior state, had the family not moved to California.

Respondents are two women who moved to California during 1996-97. Both became eligible for public assistance benefits, but were informed by state officials that their benefit levels would (temporarily) be somewhat lower than benefits provided to similarly situated long-term California residents. Respondents assert that § 11450.03 violates the Fourteenth Amendment's Equal Protection Clause by favoring long-term California residents over newcomers.

Section 11450.03 was initially adopted in 1992, a time of continuing and severe economic and fiscal problems in California. Its stated goal was to reduce the state's staggering welfare expenditures.[3] In October 1992, the Secretary of Health and Human Services (HHS) issued a waiver, signifying its approval of § 11450.03. A federal district court preliminarily enjoined California officials from enforcing the new law (*Green v. Anderson*, 811 F. Supp. 516 (E.D.Cal. 1993)), and the Ninth Circuit summarily affirmed. *Green v. Anderson*, 26 F.3d 95 (9th Cir. 1994). This Court granted certiorari and agreed to review the

[3] Respondents do not contest that California's annual public assistance benefits are mammoth. For example, in Fiscal Year 1995-96, California provided $6 billion in assistance under the Aid to Families with Dependent Children ("AFDC") program alone. Although it has only 12 percent of the nation's population, California accounts for 29% of all money spent nationwide on the AFDC program; and its monthly average caseload of 2,645,814 persons is 20% of the national AFDC caseload.

propriety of the injunction. Before the Court could rule, the Ninth Circuit (in connection with unrelated litigation) vacated the waiver that the Secretary of HHS had granted for § 11450.03; in the absence of the waiver, California lacked authority to implement its law. Consequently, the Court held that the case was not ripe for review; it vacated the decisions of the Ninth Circuit and the district court and ordered that the case be dismissed. *Anderson v. Green*, 513 U.S. 557 (1995).

The matter was revived following Congress's adoption of welfare reform legislation in 1996. The reform law (known as the Personal Responsibility and Work Reconciliation Act of 1996, or "PRWORA") explicitly authorized relocation grant provisions of the type contained in § 11450.03.[4] Pursuant to PRWORA, California obtained federal certification for its TANF plan and thereby became authorized once again to implement § 11450.03. The district court, however, issued a preliminary injunction on

[4] PRWORA is codified at 42 U.S.C. §§ 601, *et seq.* The relevant provision of PRWORA, 42 U.S.C. § 604(c), provides:

> **Authority to treat interstate immigrants under rules of former State.** A State operating a program funded under this part [42 U.S.C. §§ 601 et seq.] may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months.

PRWORA gave a new name to the former AFDC program: Temporary Assistance to Needy Families ("TANF"). Pursuant to PRWORA, the federal government provides block-grant funding to states with certified TANF plans.

June 4, 1997 against implementation of § 11450.03. Petition Appendix ("Pet. App.") 13-31.

In its opinion, the district court stated that the applicable law had remained unchanged following its 1993 opinion, and it thus re-adopted the earlier opinion. Pet. App. 26-27. The court determined that the distinction drawn by § 11450.03 between new and long-time residents of California was subject to strict scrutiny under the Equal Protection Clause. *Id.* at 27; *Green v. Anderson*, 811 F. Supp. at 521. The court said that § 11450.03 cannot withstand equal protection challenge in the absence of evidence that the law "furthers a compelling state purpose," because § 11450.03 "places a penalty on migration" (*id.*), and because "freedom of travel or migration" is a "constitutional right" that "'occupies a position fundamental to the concept of our Federal union.'" *Id.* at 518 (quoting *United States v. Guest*, 383 U.S. 745, 757-58 (1966)).

The court went on to find that California had failed to meet its heavy evidentiary burden. Pet. App. 21-30. The court rejected California's contention that the proper comparison for equal protection purposes was between Respondents and comparably-situated welfare recipients in the states from which they had come; rather, the district court held, the proper comparison was between Respondents and comparably situated welfare recipients among long-term California residents. *Id.* at 28-30. Section 11450.03 could not withstand strict equal protection scrutiny, the court held, because California had failed to justify its disparate treatment of those two groups. *Id.*

The Ninth Circuit affirmed. Pet. App. 1-12. The appeals court agreed with the district court that, for purposes of equal protection analysis, "the appropriate

comparison is between the treatment of recent residents of California and other residents of California and not a comparison of recent residents of California to residents of other states." *Id.* at 11. The appeals court determined that Respondents had "demonstrated a probability of success on the merits," based upon "the persuasive authority of our prior affirmance in *Green v. Anderson* and the apparent purpose of § 11450.03" -- which the appeals court determined to be a desire to exclude from California people "with a mindset of economic dependency." *Id.* at 10.

SUMMARY OF ARGUMENT

The California statute at issue in this case, § 11450.03, was enacted in 1992 during a period of fiscal crisis in the State. The statute at issue is an effort to reduce welfare expenditures; in adopting the statute, California determined that the impact of the reductions should fall more heavily on newcomers than on established residents, who may be less able to adjust to benefit reductions. Numerous other States (including, among others, Illinois, Iowa, Minnesota, New York, New Jersey, Pennsylvania, Rhode Island, Washington, Wisconsin, and Wyoming) have made that same determination, with the explicit blessing of Congress (as evidenced by PRWORA).

Virtually every one of these laws has been the subject of judicial challenge. At least one State supreme court (Wisconsin's) has upheld a residency-based welfare program. However, numerous federal courts have issued decisions striking down the very type of residency-based programs contemplated by PRWORA. The scope of the cost-saving measures being blocked by the lower federal courts -- amounting to more than $100 million annually nationwide -- makes this an issue of national importance that

cries out for resolution by the Court. In 1994, the Court agreed to review *Anderson v. Green*, which raised precisely the same issue. The considerations that prompted the Court to grant certiorari in that case again are present and militate in favor of granting the Petition.

The decision below treated § 11450.03 as if it were identical to the residency requirements considered in *Shapiro v. Thompson,* 394 U.S. 618 (1969), in which this Court applied heightened equal protection review to -- and ultimately struck down -- State laws that prevented newcomers from receiving welfare benefits for the first 12 months of residence in the State. But unlike the situation in *Shapiro,* in which this Court applied strict scrutiny on the basis that the programs amounted to a "penalty" on the right to interstate travel, California's denial of an *increase* in a newcomer's former benefit level is hardly a "penalty" on the newcomer's travel in any conventional sense.

Under the properly applicable standard of rational basis review, California's program is justified as a means of reducing welfare expenditures while allocating the reductions so that they fall in greater proportion on those who are relatively better able to absorb them. In comparison with established residents, who may have longstanding ties to a particular area, newcomers who are welfare recipients can more easily adjust to cuts through such decisions as their choice of communities.

Further, if the Constitution is held to require enhanced scrutiny of residency-based programs that States have established on their own authority, this Court should consider whether rational basis review should apply when, as here, the State program has been explicitly authorized by congressional statute.

REASONS FOR GRANTING THE PETITION

I. THE VALIDITY OF RESIDENCY-BASED WELFARE PROGRAMS IS AN ISSUE OF NATIONAL IMPORTANCE

Even if the decision below affected only California's public benefits program, and were irrelevant to the public benefits programs of any other State, the consequences of the decision would be considerable. The record indicates that the district court's injunction was expected to "result in additional, unbudgeted state General Fund costs in the AFDC program of $8.4 million in fiscal year 1992-93, and $22.5 million in fiscal year 1993-94,"[5] and to increase "total AFDC expenditures by $22.8 million" for "the 1997-1998 fiscal year."[6]

But the reach of the decision below extends far beyond California. Prior to the Court's decision in *Shapiro,* at least 40 States had a residency requirement of some kind for welfare assistance. *See Shapiro,* 394 U.S. at 677 (Harlan, dissenting). Encouraged by Congress's adoption of PRWORA, numerous State legislatures have adopted laws that provide for reduced levels of welfare benefits for newcomers while seeking to avoid imposing the "penalty" on interstate travel condemned in *Shapiro. See, e.g.,* 305 Ill. Comp. Stat. Ann. § 5/11-30; 1993 Iowa Act ch. 97 § 3(5); Minn. Stat. § 256D.065; N.J.S.A. 44:10-34, 46; N.Y. Soc. Serv. § 158(f); Penn. Stat. § 432(5)(ii); R.I.

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[5] Declaration of Dennis Hordyk, Assistant Director, California Dept. of Finance, Pet. App. 45.

[6] Declaration of Bruce Wagstaff, Deputy Director, Welfare Programs Division, California Dept. of Social Services, Pet. App. 37.

Gen. Laws § 40-5.1-8(e); Wis. Stat. § 49.015; Wyo. Stat. § 42-2-107(a)(iii).

As noted *infra,* many of these statutes have been challenged in the lower federal courts or State courts, and much of that litigation is ongoing. Given the massive amount of funds collectively at issue in those suits, and the States' strong interest in receiving guidance regarding which cost-saving welfare reform measures they are permitted to implement without running afoul of the Equal Protection Clause, review by this Court is warranted.

II. THE LOWER COURTS ARE IN DISARRAY AS TO THE PROPER STANDARD FOR DETERMINING WHETHER A RESIDENCY-BASED WELFARE PROGRAM IS CONSTITUTIONAL

The need for guidance from this Court as to the standard for evaluating residency-based welfare programs is reflected by recent decisions of lower federal courts and State courts, which have adopted decidedly different approaches in considering challenges to those programs.

In *Jones v. Milwaukee County,* 168 Wis.2d 892, 485 N.W.2d 21 (1992), the Wisconsin Supreme Court upheld a 60-day waiting period for welfare benefits. The court noted the "unsettled nature of the degree to which a durational residency requirement must impinge upon the right to travel to be unconstitutional," 485 N.W.2d at 901, and quoted this Court's characterization of *Shapiro* in *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974):

> Although any durational requirement impinges to some extent on the right to travel, the Court in *Shapiro* did not declare such requirements to be unconstitutional.

> The Court's holding was conditioned . . . by the caveat that some "waiting-period or residence requirements . . . may not be penalties upon the exercise of the constitutional right of interstate travel." The amount of impact required to give rise to the compelling-state-interest test was not made clear.

Jones, 485 N.W.2d at 901 (quoting *Memorial Hospital,* 415 U.S. at 256-57) (citations omitted).

The Wisconsin Supreme Court concluded that the statute before it did not amount to a penalty on interstate travel because the duration of the residency requirement was short and because the statute provided for various exceptions. *Jones,* 485 N.W.2d at 902-03. The court thus held that the statute should be evaluated under a rational basis standard; applying that test, the court upheld the requirement based on the State's "legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor." *Id.* at 905.

Similarly, the U.S. District Court for the Eastern District of Pennsylvania determined that Pennsylvania's residency-based welfare program did not penalize interstate travel (because moving to Pennsylvania could not result in a reduction of anyone's welfare benefits) and thus was subject to rational basis review. *Maldonado v. Houstoun,* 177 F.R.D. 311 (E.D. Pa. 1997), *appeal docketed,* No. 97-1893 (3rd Cir. 1997). The Pennsylvania statute is virtually identical to the California statute at issue here. In addition, another federal district court cited *Maldonado* with approval and stated in *dictum* that a virtually identical Illinois residency-based welfare program did not "penalize" travel and thus was not subject to strict scrutiny review.

Hicks v. Peters, No. 98C3247, 1998 WL 424176 (N.D. Ill. July 17, 1998).[7]

In contrast, other district courts have joined the Ninth Circuit in finding that strict scrutiny should be applied to *any* welfare program that treats newcomers to a State less generously than those who have lived in the State for a longer period of time. *See, e.g., Westenfelder v. Ferguson*, 998 F. Supp. 146 (D.R.I. 1998), *appeal docketed*, No. 98-1431 (1st Cir. May 14, 1998); *Ruffin v. Quasim*, No. C97-5768 FDB (W.D. Wa. Feb. 6, 1998).

The differing conclusions among these courts is an inevitable product of the absence of a clear standard in the case law of this Court. Neither *Shapiro* nor subsequent cases indicate whether enhanced scrutiny must be applied to residency-based benefit levels that do not involve a complete deprivation of benefits. As the Third Circuit has observed, "The Supreme Court has yet to articulate why it has applied rational basis review in some right to travel cases and strict scrutiny in others, except to say that where a law cannot meet the minimum rationality requirement there is no need to undertake a more searching inquiry." *Schumacher v. Nix*, 965 F.2d 1262, 1267 (3d Cir. 1992).

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[7] *Maldonado* ultimately struck down the Pennsylvania statute because, the district court found, Pennsylvania failed to articulate a rational basis for its law. Of course, Pennsylvania's failure in that regard has no bearing on whether California ought to be permitted a similar opportunity to defend its residency-based welfare program under a rational basis standard of review. The Illinois statute at issue in *Hicks* was also invalidated, on similar grounds.

III. THE NINTH CIRCUIT'S APPLICATION OF STRICT SCRUTINY CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT

A legislative classification normally will be found to deny equal protection only if it is not "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). The district court found that this was the rare case in which heightened review was appropriate because, it held, § 11450.03 imposes a "penalty" on the right to travel. *Green v. Anderson*, 811 F. Supp. at 521.[8] The Ninth Circuit affirmed, based on the "persuasive authority of our prior affirmance in *Green v. Anderson*," a decision in which the appeals court had adopted the district court's reasoning. Pet. App. 10; *Green v. Anderson*, 26 F.3d 95 (9th Cir. 1994), *vacated as moot*, 513 U.S. 557 (1995). The decision to subject § 11450.03 to heightened equal protection scrutiny conflicts with numerous decisions of this Court.

A. Section 11450.03 Cannot Be Said to "Penalize" Respondents' Travel When They Are No Worse Off Than If They Had Never Moved

The Court has applied heightened scrutiny in two cases in which state statutes challenged under the Equal Protection Clause were said to impose a penalty on interstate travel. In *Shapiro*, the Court applied strict equal protection

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[8] The district court's June 4, 1997 opinion did not specify what level of equal protection review it was applying in striking down § 11450.03. However, the opinion stated explicitly that the court was adopting the "right of migration" analysis contained in its 1993 *Green v. Anderson* opinion (Pet. App. 27), and (as noted above) that earlier opinion had subjected § 11450.03 to heightened review.

scrutiny to State laws that prevented newcomers from receiving *any* assistance under the AFDC program for the first 12 months of residence. The Court held that the right to interstate travel is recognized by the Constitution as a "fundamental" right upon which states may not impose any "unreasonabl[e] burden." *Shapiro*, 394 U.S. at 629-30. The Court said that any classification that serves to "penalize" the exercise of the right to travel violates equal protection "unless shown to be necessary to promote a *compelling* government interest." *Id.* at 634 (emphasis in original). The Court said that the challenged laws imposed just such a penalty: such laws deprive migrating indigents of *any* AFDC benefits for a 12-month period following departure from their former states of residence.

The Court applied strict scrutiny in a second "right to travel" case several years later: *Memorial Hospital*, a challenge to an Arizona law requiring a year's residence as a condition to an indigent's receiving nonemergency medical care at county expense. The Court applied its "compelling state interest" standard after determining that the law "penalized" the right to interstate travel. *Memorial Hospital,* 415 U.S. at 257-62. Nonetheless, as noted above, the Court emphasized that some incidental burdens on interstate travel are not sufficiently onerous to trigger strict scrutiny. *Id.* at 256-57. *Memorial Hospital* thus stands for the eminently sensible proposition that laws imposing only minor burdens on the right to interstate travel are not to be subjected to strict scrutiny under the Equal Protection Clause. In the absence of such a rule, commonplace financial exactions (such as tolls collected at interstate bridges or taxes on interstate airline flights) would be rendered suspect.

The courts below found California's residency-based benefit levels constituted a "penalty" on the exercise of the

right to travel because they treat newcomers to California differently from other California residents. *Green v. Anderson*, 811 F. Supp. at 521; Pet. App. 28-29. Hence the courts held that heightened equal protection scrutiny must be applied to California's classification of its residents.

Because § 11450.03 generally provides new residents the same AFDC benefits that they were eligible to receive before moving to California, however, the statute can hardly be said to "penalize" interstate migration in any normal sense of the word. Nor does the statute deny newcomers the exercise of a fundamental right, such as the right to vote. *See Dunn v. Blumstein*, 405 U.S. 330 (1972). The rational basis standard should therefore govern in this case.

B. *Zobel, Hooper,* and *Soto-Lopez* Were Not "Right-to-Travel" Cases and Did Not Invoke Heightened Scrutiny

In an effort to bolster their contention that § 11450.03 imposes a penalty on interstate travel (and thus is subject to heightened scrutiny), the courts below cited to three Supreme Court equal protection decisions involving challenges to laws that classified state residents based on length of residence. Pet. App. 11, 27-30. The courts below simply misinterpreted these decisions; none of the three implicated the right to interstate travel, and in none did the Court apply heightened equal protection scrutiny.

Zobel v. Williams, 457 U.S. 55 (1982), involved an Alaska statute that provided annual cash payments to all adult residents based on years of residence; those who had lived in Alaska for one year would receive one dividend unit, those who had lived in Alaska for 21 years would

receive 21 dividend units, etc. The Court held that the cash distribution scheme violated equal protection because Alaska had "shown no valid state interests which are rationally served" by the scheme's creation of numerous, permanent classes of residents. *Zobel*, 457 U.S. at 65. The Court never suggested that the Alaska payment scheme imposed a penalty on interstate travel[9] and did not hold that the scheme was subject to heightened scrutiny.

Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985), involved a New Mexico statute that provided a partial property tax exemption to Vietnam War veterans, but limited the exemption to veterans who were New Mexico residents prior to 1976. Relying on its opinion in *Zobel*, the Court held that the different treatment afforded New Mexico war veterans based on the date they first became New Mexico residents violated equal protection because it did not "rationally further[]" any "legitimate state purpose." *Hooper*, 472 U.S. at 618-623. Because the Court found that the statute did not pass "even the minimum rationality test," the Court had no occasion to consider whether the statute penalized interstate travel or should be subjected to heightened scrutiny. *Id.* at 618.

Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986), involved a New York law that provided a civil service preference to New York veterans, but only if they were New York residents at the time they first entered military service. A splintered Court struck down the law on equal protection grounds, but no opinion commanded a

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[9] Indeed, such a finding would have been untenable, since the Alaska payment scheme could only serve to encourage migration from other states, which lacked similar payment schemes.

majority. Nor could the Court agree regarding whether heightened equal protection review was appropriate. Four justices (the three dissenters plus Justice White) said that rational basis review should apply because the law did not implicate the right to travel. *Soto-Lopez*, 476 U.S. at 916 (White, J., concurring in the judgment); *id.* at 922 (O'Connor, J., dissenting). Four justices said that heightened equal protection review was required because the statute "operates to penalize appellees for exercising their rights to migrate." *Id.* at 909 (plurality opinion). The ninth justice, Chief Justice Burger, said that the statute flunked the rational basis test and thus there was no reason to decide whether heightened scrutiny applied. *Id.* at 912-16 (Burger, C.J., concurring in the judgment).

Accordingly, nothing in *Zobel*, *Hooper*, or *Soto-Lopez* supports the lower courts' holding that § 11450.03, by differentiating among residents based on length of residency, implicates the right to interstate travel and thus is appropriately subject to heightened equal protection scrutiny.

C. California Has No Obligation To Subsidize Respondents' Exercise of Their Right to Travel

As noted above, *Memorial Hospital* makes clear that laws imposing minor burdens on interstate travel (e.g., interstate bridge tolls, taxes on interstate airplane tickets) do not constitute a "penalty" such that heightened equal protection review is warranted. If minor burdens on interstate travel do not warrant heightened review, then surely a State's decision not to confer a benefit on migrants (such as a decision not to provide welfare benefits at a level higher than the migrants were eligible to receive in their former state) does not warrant heightened review.

The Court has repeatedly held that government has no obligation to subsidize the exercise of even fundamental rights. Thus, in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), the Court rejected a nonprofit organization's claims of free speech/equal protection rights to receive tax deductible contributions to support its lobbying activity. The Court explained that the "decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Id.* at 549. Here, California has not "regulated" the right to travel, but has, at most, "simply chosen not to pay" the costs associated with its exercise. *Id.*

Like the classification in the Food Stamp Act upheld by the Court in *Lyng v. UAW*, 485 U.S. 360 (1988), which denied food stamps to households of striking workers, California's classification "does not 'order or prevent'" anyone from migrating to the state. *Id.* at 365 (citation omitted). The Court noted in *Lyng*, "Strikers and their union would be much better off if food stamps were available, but the strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right." *Id.* at 368. *See also Harris v. McRae*, 448 U.S. 297, 321-26 (1980)(Medicaid funding need not be provided for women seeking medically necessary abortions).

In short, the Constitution "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 196 (1989). California may not, of course, employ irrational classifications as the basis for withholding governmental aid; but surely a decision not to *increase* aid above what an indigent individual has

previously received (thereby declining to subsidize the indigent's travel) does not provide justification for courts to employ heightened equal protection scrutiny.

D. The Relevant Comparison for Purposes of Determining Whether Respondents' Right to Travel Has Been Penalized Is Between Respondents and Comparably-Situated Welfare Recipients in the States from Which They Came

In support of its contention that § 11450.03 penalizes the right to interstate travel, the appeals court asserted that the relevant comparison for determining the existence of a penalty is between Respondents and comparably-situated welfare recipients among long-term California residents, not between Respondents and comparably-situated welfare recipients in the states from which they had come. Pet. App. 11. In making that assertion, the appeals court has misconstrued *Zobel, Hooper*, and *Soto-Lopez*.

As noted above, those three cases involved classifications of residents of a State based on duration of residency. In none of the cases did the Court apply a "right to travel" analysis or find that heightened scrutiny was warranted. Although the Court's equal protection analysis in the cases involved comparing newcomers to long-term residents of the same State, the Court did so for the purpose of determining whether the State had a rational basis for treating those two groups differently. It never suggested that a comparison between those two groups was relevant to determining whether the schemes penalized travel.

The two cases in which the Court has found that public assistance statutes penalized exercise of the right to travel -- *Shapiro* and *Memorial Hospital* -- involved plaintiffs who

were demonstrably worse off after moving to new States. In both instances, plaintiffs were eligible for public assistance in their prior States but were barred from receiving assistance for 12 months in their new States. Thus, the Court apparently determined that strict equal protection scrutiny was appropriate in these two cases based on a comparison between the plaintiffs and similarly situated welfare recipients *in the States from which they had come.*

IV. § 11450.03 IS JUSTIFIED BY THE DIFFERING RELIANCE INTERESTS OF LONGTIME RESIDENTS AND NEWCOMERS

The residency-based benefit levels adopted by California easily pass rational basis review. Residency-based cuts in benefits allocate cuts so that they fall in greater proportion on those who can best shoulder them. In comparison with established residents of the state, who are more likely to have longstanding ties to a particular area, newcomers who are welfare recipients can more easily adjust to cuts through their choice of communities and lifestyles. Petitioners never had the opportunity to make such a showing, however, because the lower courts erroneously applied strict scrutiny.

While recipients of public benefits do not, of course, have a constitutional right to continued receipt of their benefits at accustomed levels, a state's desire to respect expectation and reliance interests has been recognized by the Court as a legitimate objective, although it necessarily discriminates against the interests of newcomers. See, e.g., *Nordlinger v. Hahn*, 505 U.S. 1 (1992). In *Nordlinger*, the Court considered an equal protection challenge to a California provision that restricted increases in the assessed valuation of real property to 2% each year. *Id.* at

5. Property sales triggered new assessments at market value. *Id.* Because real estate prices were escalating, the scheme forced newcomers to pay considerably higher real estate taxes than longtime owners. *Id.*

The Court, applying the rational basis standard of review, cited two grounds sufficient to uphold the classification: (1) an interest "in local neighborhood preservation, continuity, and stability"; and (2) the fact that "a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner." *Id.* at 12. Here, as in *Nordlinger,* the State may have thought established residents hold greater "vested expectations" in their level of benefits and in the lifestyle, however modest, that they have been able to finance with those benefits for their children. Also, a prospective new resident "has full information" about the reduced benefits when he moves into the state, and can consider them in deciding where to move. *Id.* These legitimate, non-invidious reasons for the distinction are sufficient to justify it under a rational basis standard. Accordingly, the Petition cannot be opposed on the ground that it raises a mere abstract policy question; rather, whether § 11450.03 is subjected to strict scrutiny or a more relaxed rational basis standard of review is likely to be outcome determinative.

V. THE VALIDITY OF CALIFORNIA'S PROGRAM IS FURTHER SUPPORTED BY CONGRESSIONAL AUTHORIZATION

The courts below overturned not only the judgment of the California legislature but also that of Congress, which expressly authorized such programs when it adopted PRWORA. Hence, even if California's plan is held to be

a "penalty" upon travel by indigents, the question is not the standard of review to be applied when a state establishes such a program on its own, but the standard of review to be applied when a state establishes such a program with congressional authorization. The existence of congressional approval provides an independent reason for employing a deferential "rational basis" review.

As the Court stated in *Lyng*, "[O]ur review of distinctions that Congress draws in order to make allocations from a finite pool of resources must be deferential, for the discretion about how best to spend money to improve the general welfare is lodged in Congress rather than the Courts." *Lyng*, 485 U.S. at 373. Moreover, while Congress is clearly subject to equal protection restraints, it is less clearly bound by the restraints imposed by virtue of the constitutional right to travel (the asserted basis for the district court's resort to heightened equal protection scrutiny of § 11450.03). The Court has never identified a precise textual source for the right to travel; and at least three of the constitutional provisions suggested as bases for that right -- the Privileges and Immunities Clauses of Art. IV, § 2 and of the Fourteenth Amendment; and the Commerce Clause -- are inapplicable to Congress and can be overridden by Congress in their application to the states.

The Court has never before passed directly on Congress's power to authorize States to burden interstate travel. That issue provides an additional reason for granting the Petition.

CONCLUSION

Amici curiae Washington Legal Foundation, *et al.*, respectfully request that the Court grant the Petition.

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No. 98-97

In the Supreme Court of the United States

OCTOBER TERM, 1997

ELOISE ANDERSON, ET AL.,
Petitioners

v.

BRENDA ROE AND ANNA DOE,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA, AND THE STATES OF ALABAMA, COLORADO, FLORIDA, GEORGIA, ILLINOIS, MINNESOTA, MISSISSIPPI, NEVADA, NEW HAMPSHIRE, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, RHODE ISLAND AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICI

The *amici* States, like California, are responsible for administering a variety of welfare programs within their respective jurisdictions. These include the cash and non-cash assistance programs authorized by the federally-funded Temporary Assistance to Needy Families (TANF) program.

Congress, when it created TANF as the successor to the former Aid to Families with Dependent Children (AFDC) program, expressly authorized the States to adopt durational residency rules of the kind enacted by California. These rules, unlike some which the Court has condemned in the past, do not deny cash welfare benefits to new residents, but temporarily key benefits to those which recipients would have received in their State of prior residence. Differences among the States in their cash benefit programs are thus neutralized as a factor in the decision whether to migrate from one State to another; and welfare recipients are encouraged to look to self-sufficiency, rather than a larger welfare grant, as the way to get ahead.

Some of the *amici*, in response to Congress' invitation, have enacted residency rules similar to California's, and have a substantial interest in the outcome of this case. All of the *amici* have an interest in encouraging state experimentation and innovation to attack the seemingly intractable problems of poverty, and especially in encouraging approaches which encourage self-support rather than continued dependency on the part of welfare recipients.

SUMMARY OF ARGUMENT

1. This case presents an important issue of federal law which has not been, but should be, reviewed by the Court. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Court held that the Constitution was violated by rules which denied welfare benefits altogether to new residents, because those rules penalized persons who exercised their right to interstate migration. The Court, however, has never addressed the constitutionality of rules, like the California rule in this case, which leave interstate migrants in the same position in which they would have been had they not migrated.

California's rule is neither isolated nor parochial. Rather, residency rules of this kind are an integral feature of the national effort at welfare reform which have been endorsed by Congress and adopted by many States. In light of *Shapiro*, however, they have been, and likely will continue to be, the subject of recurrent challenges until the Court resolves the issue of their legitimacy.

2. The current state of the law in this area is unsatisfactory. *Shapiro v. Thompson* and its progeny asserted a "right to travel," but, contrary to the Court's decisions in other areas, neither moored that right to a constitutional text nor anchored it in the traditions of the Nation. As a result, the contours of the "right to travel" have remained indeterminate, and lower courts have often expressed difficulty in applying *Shapiro* to new situations. The Court should review this case to provide a firmer doctrinal base for "right to travel" analysis.

ARGUMENT

I. THE CONSTITUTIONALITY OF RESIDENCY RULES LIKE CALIFORNIA'S, WHICH HAVE BEEN ENDORSED BY CONGRESS AND ADOPTED BY MANY STATES, PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, REVIEWED BY THE COURT.

Four years ago, in another case from California, the Court granted certiorari to resolve the issue now presented again by the petition in this case, but ultimately held that the case had become unripe and so did not reach the merits. *Anderson v. Green*, 513 U.S. 557 (1995). Since then, because of developments at the national level, the importance of this issue has only increased.

In 1996, Congress enacted a fundamental change in the Nation's welfare laws. Until that time, the federal government's primary vehicle for providing cash assistance to needy families was the Aid to Families with Dependent Children or "AFDC" program, formerly codified at 42 U.S.C. §§ 601 *et seq*. AFDC, established in 1935 as part of the Social Security Act, *King v. Smith*, 392 U.S. 309, 313 (1968), was an exercise in "cooperative federalism," largely administered by the States but financed by a combination of state and federal funds. *Id.*, at 316. AFDC was conceived as an entitlement program, in which recipients' eligibility for benefits, and the state and federal governments' financial commitment to pay for them, were essentially open-ended.

After decades of experience with AFDC, however, Congress concluded that "[t]here is little doubt that the current welfare system is a failure." H.R. Rep. No. 651, 104th Cong.,

2nd Sess. (1996), p. 3.

> The welfare system contradicts fundamental American values that ought to be encouraged and rewarded: work, family, personal responsibility, and self-sufficiency. Instead, the system subsidizes dysfunctional behavior.... [It] discourages work [and] encourages long-term dependency.

Id., p. 4. In Congress' view, the then-current welfare system also promoted out-of-wedlock childbearing and its attendant social pathologies, was associated with high crime rates, and — despite massive spending over the years — had not reduced the poverty rate, which had remained essentially unchanged since 1960. *Id.*, p. 3-5.

In the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 (1996), Congress abolished AFDC, establishing in its stead a new program, known as Temporary Aid to Needy Families or "TANF," likewise codified at 42 U.S.C. §§ 601 *et seq.*, as amended. Of the many changes encompassed by this legislation, we mention here only a few that are relevant to this case.

First, TANF is not an open-ended entitlement program. The statute provides that it "shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part," 42 U.S.C. § 601(b). There is a lifetime limit of 60 months' eligibility for benefits, 42 U.S.C. § 608(a)(7), and after 24 months of benefits, recipients must be engaged in work. 42 U.S.C. § 602(a)(1)(A)(ii). Nor is the federal financial commitment an open-ended one, in which a State automatically gets money for each aid recipient. Rather, each

State gets a finite amount — essentially capped at 1994 levels at least through the year 2002, 42 U.S.C. § 603(a)(1)(B) — which it must then manage as it thinks best.[1]

Second, the statute "grants maximum State flexibility to show true compassion by helping those in need achieve the freedom of self-reliance." H.R. Rep. No. 651, 104th Cong., 2nd Sess. (1996), p. 3. Thus, the federal funds allotted under TANF are block grants which each State has great discretion to manage; TANF money may be used not just for cash assistance to eligible families, but for a variety of other programs such as education, job training, and child care. 42 U.S.C. § 604(a) (States may use grants "in any manner that is reasonably calculated to accomplish the purpose of this [act]").

Congress was concerned, however, that in exercising their discretion under the new legislation, "States that want to pay higher benefits ... not be deterred from doing so by the fear that they will attract large numbers of recipients from bordering States." H.R. Rep. No. 651, 104th Cong., 2nd Sess. (1996), p. 1337. Congress knew that the Court, in *Shapiro v. Thompson*, 394 U.S. 618 (1969), had invalidated laws which attempted to deal with this problem by denying benefits altogether to new residents, but knew also that the Court "ha[d] not ruled on the question of paying *lower* amounts of aid for incoming residents." H.R. Rep. No. 651, 104th Cong., 2nd Sess. (1996), p. 1337 (emphasis added); H.R. Conf. Rep. No. 725, 104th Cong., 2nd Sess. (1996), p. 272-73 (same).

Congress therefore adopted a more nuanced approach

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[1]Each State must continue its funding at least at 80% of 1994 levels. 42 U.S.C. § 609(a)(7).

than that condemned in *Shapiro*, and provided that States

> may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months.

42 U.S.C. § 604(c); *see* 42 U.S.C. § 602(a)(1)(B)(i) (State plan to indicate whether State intends to treat families moving into the State differently from other families, and if so, how).

In response to Congress' authorization, at least eleven other States have adopted residency rules similar to California's.[2] These rules, like California's, do not deny welfare benefits to new residents, but they do temporarily key those benefits to what the recipient would have received in the State of prior residence. They thus make welfare benefits a neutral factor in the decision whether to migrate from one State to another, and encourage recipients to look to work, rather than a larger welfare grant, as the way to get ahead.

Some States are already defending these rules against

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[2]*See* Ga. Code § 49-4-187; Ill. Ann. Stat. ch. 305, para. 5/11-30 (Smith-Hurd); Md. Regs. Code § 07.03.03.12E; Minn. Stat. Ann. § 256J.43; N.J. Stat. Ann. § 44:10-46; N.Y. Soc. Serv. Law § 117.3 (McKinney); N.D. Cent. Code § 50-09-29(*l*); Pa. Stat. Ann. tit. 62, § 432(5)(ii) (Purdon); Wash. Rev. Code Ann. § 74.08.025(c)(2). *See also* Fla. Stat. Ann. tit. 30, § 414.105(6) (for first 12 months, time limit on receipt of benefits is Florida limit or limit of State of prior residence, whichever is shorter); R.I. Gen. Laws § 40--5.1-8(e) (30% reduction in amount of cash benefits until 12 months consecutive residence).

claims that they are inconsistent with *Shapiro's* analysis. *See Hicks v. Peters*, No. 98C3247 (N.D. Ill. July 18, 1998); *Westenfelder v. Ferguson*, 998 F.Supp. 146 (D. R.I. 1998) (granting preliminary injunction), *appeal docketed*, No. 98-1431 (1st Cir. May 14, 1998); *Ruffin v. Quasim*, No. C97-5767 FDB (W.D. Wash. Feb. 6, 1998) (granting preliminary injunction); *Maldonado v. Houstoun*, 177 F.R.D. 311 (E.D. Pa. 1997) (granting preliminary injunction), *appeal docketed*, No. 98-1893 (3d Cir. Nov. 20, 1997); *Sanchez v. Department of Human Services*, No. A-466-97T1F (N.J. Super. Ct. App. Div. July 8, 1998); *Davis v. Doth*, No. 62-C6-97-010231 (Minn. St. Dist. Ct. July 31, 1998).

It seems likely that these challenges will continue to recur, and the legitimacy of this aspect of welfare reform will remain in doubt, until the Court resolves the issue. The Court should take this opportunity to do so.

II. THE COURT SHOULD TAKE THIS OPPORTUNITY TO REVIEW ITS "RIGHT TO TRAVEL" JURISPRUDENCE, WHICH IS UNSETTLED AND UNSATISFACTORY.

The point of departure for the Court's modern right-to-travel jurisprudence is *Shapiro v. Thompson*, 394 U.S. 618 (1969). In *Shapiro*, the Court considered welfare laws from two States and the District of Columbia, each of which denied welfare benefits to applicants who had not resided within the jurisdiction for at least one year. *Id.*, at 620. The Court first held that

> in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and *any classification which serves to penalize that right*, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.

Id., at 634 (emphasis added). Holding that the provisions in question — which resulted in a complete denial of benefits — did penalize the right to travel, the Court rejected every proffered justification of them, as reflecting governmental interests that were either insufficiently compelling or simply illegitimate. *Id.*, at 627. Accordingly, the Court held that the provisions violated the Fourteenth Amendment's Equal Protection Clause. *Ibid.* The Court emphasized, however, that it was not invalidating waiting-period or residence requirements *per se*. To the contrary, in other contexts:

> [s]uch requirements may promote compelling state interests on the one hand, or, on the other, *may not be penalties* upon the exercise of the constitutional right of interstate travel.

Id., at 638, n.21 (emphasis added). *Accord Memorial Hospital v. Maricopa County*, 415 U.S. 250, 256-57 (1974).

In contrast to its approach in earlier cases involving travel,[3] the Court in *Shapiro* specifically declined to ground its

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[3]For example, the *Passenger Cases*, 7 How. 283 (1849), relied on the Commerce Clause. *Paul v. Virginia*, 8 Wall. 168 (1869), relied on the Privileges and Immunities Clause of Art. IV, § 2. *Twining v. New Jersey*, 211 U.S. 78 (1908), relied on the Privileges and Immunites Clause of the Fourteenth Amendment. *Kent v. Dulles*, 357 U.S. 116 (1958) relied on the Due Process Clause of the Fifth Amendment. *See Shapiro*, 394 U.S. at 630 n.8 (citing these and other (continued...)

analysis upon a constitutional text:

> We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision. It suffices that ... [it] "occupies a position fundamental to the concept of our Federal Union."

Id., at 630, *quoting United States v. Guest*, 383 U.S. 745, 757 (1966). Nor, in shaping the contours of the right it had just asserted, did the Court look to historical practice or legal tradition. To the contrary: while the Court acknowledged that laws to discourage the influx of indigents into a given jurisdiction had been "prevalent" in American and English societies for "centuries,"[4] *Shapiro*, 394 U.S. at 628 n.7, the Court declared that this was a "constitutionally impermissible" purpose. *Id.*, at 631.

In the wake of *Shapiro*, then, much was left unclear: most importantly, the nature and source of the constitutional right to travel, and — flowing from this initial uncertainty — the kinds of laws which might constitute a "penalty" upon the exercise of

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[3](...continued)
cases).

[4]In the *Passenger Cases*, 7 How. 283 (1849), a divided Court struck down state taxes imposed on passengers entering Boston and New York harbors, as violating the Commerce Clause. All of the Justices, however, accepted without question the idea that the States could exclude from their borders paupers and those who were likely to become a public charge. *E.g., id.*, at 406 (McLean, J.); *id.*, at 426 (Wayne, J.); *id.*, at 457 (McKinley, J.); *id.*, at 469 (Taney, C.J., dissenting).

that right, and the nature of the governmental interests which the Court might find compelling enough (or even legitimate) to justify such a "penalty."

Later cases have done little to dispel this uncertainty. By 1986, in the most recent of the Court's right-to-travel decisions, the plurality opinion was still maintaining that "[t]he textual source of the constitutional right to travel ... has proved elusive.... [W]e have not felt impelled to locate this right definitively in any particular constitutional provision," *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (plurality opinion of Brennan, J.), while the dissenting Justices criticized that opinion's reliance on "some free-floating 'right to migrate'...." *Id.*, at 918 (O'Connor, J., dissenting).

> It is unfortunate that the Court has once again failed to articulate and justify by reference to textual sources a single constitutional principle or analysis upon which it can rely in deciding cases such as this.

Id., at 920 (O'Connor, J., dissenting).

This failure in turn has led to the recurrent criticism that *Shapiro's* approach, unbounded by text or tradition, simply cloaks ad hoc value judgments that should properly be left to elected officials. That criticism began with *Shapiro* itself, and has continued. *See, e.g., Shapiro*, at 654 (Warren, C.J., dissenting) ("The era is long past when this Court under the rubric of due process has reviewed the wisdom of ... congressional decision[s]"); *id.*, at 662 (Harlan, J., dissenting) ("I know of nothing which entitles this Court to pick out particular human activities, characterize them as 'fundamental,' and give them added protection...."); *Memorial Hospital v. Maricopa*

County, 415 U.S. at 286 (Rehnquist, J., dissenting) ("the Court should observe its traditional respect for the State's allocation of its limited financial resources rather than unjustifiably imposing its own preferences"); *Attorney General of New York v. Soto-Lopez*, 476 U.S. at 925 (O'Connor, J., dissenting) ("the plurality's right to travel analysis [threatens to] swallow all the traditional deference shown to state economic and social regulation").

Moreover, *Shapiro's* approach has become increasingly out of step with the rest of the Court's jurisprudence. In general doctrinal terms, the Court has often expressed its "reluctan[ce] to expand the concept of substantive due process," *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992), preferring instead to rely wherever possible on specific textual constitutional provisions. *See, e.g., Graham v. Connor*, 490 U.S. 386 (1989) (claim of excessive force by law enforcement officer to be analyzed under Fourth Amendment rather than under substantive due process). And when the Court has resorted to substantive due process, it has "required a 'careful description' of the asserted fundamental liberty interest," and has been guided by "[o]ur Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 117 S.Ct. 2258, 2268 (1997), *quoting Reno v. Flores*, 507 U.S. 292, 302 (1993). Even at the level of specific cases, it is difficult to reconcile the holding of *Shapiro* — that government may not withhold welfare benefits from people who exercise their right to migrate across state lines — with cases such as *Lyng v. Int. Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 485 U.S. 360 (1988) — that government may withhold them from people who exercise their right to strike.

Given all this, it is no surprise that lower courts have frequently expressed difficulty in applying *Shapiro's* analysis to

new situations, and discomfort with its results. *See, e.g., Bethesda Lutheran Homes and Services, Inc. v. Leean*, 122 F.3d 443, 448 (7th Cir. 1997) ("seems odd ... to suppose the ... government constitutionally obligated to provide financial assistance to indigents in a form that will encourage them to seek ... distant states," but nevertheless required by *Shapiro*); *Lutz v. City of York*, 899 F.2d 255, 260-61 (3d Cir. 1990) (seven different constitutional sources have been suggested for the right to travel, but "the Court recently has provided precious little guidance on which of them presently gives rise to a right to travel, and the respective scope of each"); *Westenfelder v. Ferguson*, 998 F.Supp. at 151 nn. 5 & 6, 152 ("precise constitutional source of the right to travel has never been identified," "right-to-travel jurisprudence is somewhat muddled," "[p]recisely what constitutes a 'penalty' is uncertain"); *Maldonado v. Houstoun*, 177 F.R.D. at 323 (right to travel jurisprudence is "fractured," "unsettled and clearly in need of clarification by the ... Court"); *Jones v. Milwaukee County*, 485 N.W.2d 21, 26 & n.4 (Wis. 1992) ("cases addressing durational residency requirements have not clarified the amount of impact necessary to give rise to the compelling state interest standard.... [T]he parameters of *Shapiro's* penalty analysis ... remain undefined").

The Court should review this case, and take this opportunity to clarify the analysis of right-to-travel claims.

CONCLUSION

The Court should grant the petition.

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On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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Docket Entries

IN THE UNITED STATES COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRENDA ROE, et al.,

Plaintiffs,

v.

ELOISE ANDERSON,

Defendants.

_____/

97-CIV-S-97-0529 DFL

DATE	NR	PROCEEDINGS
4/1/97	1	COMPLAINT for Declaratory and Injunctive Relief, fee status paid; receipt #177889, assigned to Honorable David F. Levi Referred to Magistrate Judge John F. Moulds (vc) [Entry date 04/02/97]
4/1/97	2	NOTICE by plaintiff Brenda Roe, plaintiff Anna Doe of claim of unconstitutionality of federal law [ED LR 123(A)] (vc) [Entry date 04/02/97]
4/1/97	3	APPLICATION by plaintiffs Brenda Roe and Anna Doe for provisional class certification (vc) [Entry date 04/02/97]
4/1/97	4	MEMORANDUM by plaintiff Brenda Roe, plaintiff Anna Doe in support of provisional class certification [3-1] (vc) [Entry date 04/02/97]
4/1/97	5	DECLARATION of Mark D. Rosenbaum in support of class certification [3-1] (vc) [Entry date 04/02/97]

4/1/97	–	LODGED [proposed] Order provisionally certifying plaintiff class by plaintiff Brenda Roe, plaintiff Anna Doe (vc) [Entry date 04/02/97]
4/1/97	–	LODGED [proposed] Order to Show Cause by plaintiff Brenda Roe, plaintiff Anna Doe (vc) [Entry date 04/02/97]
4/1/97	6	NOTICE OF MOTION AND MOTION for temporary restraining order by plaintiffs Brenda Roe and Anna Doe, and for order to show cause motion TO BE HEARD by Honorable Lawrence K. Karlton (vc) [Entry date 04/02/97]
4/1/97	7	MEMORANDUM by plaintiff Brenda Roe, plaintiff Anna Doe in support of temporary restraining order [6-1], [6-2] and preliminary injunction (vc) [Entry date 04/02/97]
4/1/97	8	DECLARATION of Mark D. Rosenbaum in support of notice of TRO motion [6-1] (vc) [Entry date 04/02/97]
4/1/97	9	EXHIBITS by plaintiff Brenda Roe, plaintiff Anna Doe in support of temporary restraining order [6-1] [6-2] and preliminary injunction (vc) [Entry date 04/02/97]
4/1/97	–	LODGED [proposed] Temporary Restraining Order by Plaintiff Brenda Roe, plaintiff Anna Doe (vc) [Entry date 04/02/97]
4/1/97	10	EX PARTE application by plaintiff Brenda Roe, plaintiff Anna Doe for leave to proceed under fictitious name (vc) [Entry date 04/02/97]

4/1/97	11	MEMORANDUM by plaintiff Brenda Roe, plaintiff Anna Doe in support of ex parte application for leave to proceed under fictitious name [10-1] (vc) [Entry date 04/02/97]
4/1/97	–	LODGED [proposed] Order granting leave to file under fictitious name by plaintiff Brenda Roe, plaintiff Anna Doe (vc) [Entry date 04/02/97]
4/1/97	17	MINUTES of Proceeding before Honorable Lawrence K. Karlton motion for temporary restraining order by plaintiffs Brenda Roe and Anna Doe [6-1] GRANTED; the order granting leave to file under fictitious name, GRANTED; further breifing [sic]: 15 days and 10 days to respond; hearing to be scheduled after briefs are filed in 25 days, by Judge Levi's courtroom clerk; court order to follow (gk) [Entry date 04/02/97]
4/1/97	19	ORDER requiring Joint Status Report before Honorable David F. Levi (cc: all counsel) (vc) [Entry date 04/04/97]
4/2/97	14	ORDER AFTER HEARING by Honorable Lawrence K. Karlton pending the hearing on the order to show cause set forth herein, pltfs' motion for TRO [10-1], is GRANTED in accordance with the provision set forth in the separate order, filed 4/1/97; pltfs' ex parte application for leave to file declaration under fictitious name and for order to proceed under fictitious names is GRANTED in accordance with the order, filed 4/1/97;

the Court DEFERS provisional certification of the class counsel for dft agreement, at hearing, to treat the restraining order as affecting all applicants benefits; OSC hearing tentatively set for 9:00 am on 5/16/97; the hearing date and time will automatically become final unless the court notifies the parties otherwise; dfts shall file and serve their brief for the hearing not later than 4/16/97; ptlf shall file their reply not later than 4/28/97; AND the aforementioned breifing [sic] schedule shall remain in effect even if the hearing is modified, unless the parties are directed otherwise by further order of the court (cc: all counsel) (gk)

4/2/97	15	ORDER TO SHOW CAUSE by Honorable Lawrence K. Karlton hearing set for 3:00pm on 4/1/97, or as soon as possible thereafter as counsel may be heard in the courtroom of the Judge Lawrence K. Karlton; this order to show cause and supporting papers must be served on dfts no later than 12:00pm on 4/1/97; any response or opposition to this OSC must be filed and personally served on pltf's counsel not later than 4/2/97 (cc: all counsel) (gk)
4/2/97	16	ORDER by Honorable Lawrence K. Karlton That all pleadings, documents and other papers in this case be filed substituting pltfs' fictitous [sic] names for the pltfs' real names and leave to file pltfs' original declarations be filed under seal (cc: all counsel) (gk)

4/2/97	18	ORDER by Honorable Lawrence K. Karlton TRO [0-0] GRANTED; pending the hearing on the order to show cause, dfts and their agents, assignees, and successors in interest are enjoined from implementing: 1) Section 11450.03(a) of the CA Welfare and Institution Code; 2) regulations promulgated pursuant to sect 11450.03(a) of the Ca Welfare and Institution Code, Including but not limited to M.P.P.E.A.S. Sec 89-110.4; and 3) All-County Letter ("ACL") 97-11 to the extent that the ACL denies standard of California AFDC or TANF benefits to members of the ptlf class or determines any AFDC or TANF benifits [sic] in whole or in part by reference to the AFDC or TANF grant any other state or territory; within ten calendar days. dfts shall issue on All-County letter to the same effect, and dfts shall provide pltfs' counsel with a copy thereof; pltfs will be permitted to proceed in this matter without posting bond or any other security (cc: all counsel) (gk)
4/9/97	20	APPLICATION for Order certifying the fact that the constitutionality of an act of congress affecting the public interest has been drawn into questions by dfts Eloise Anderson, CA Dept Social Svcs (ndd) [Entry date 04/10/97]
4/9/97	–	LODGED Order certifying the fact that the constitutionality of an Act of Congress has been drawn into questions by DFTS Eloise Anderson, CA Dept Social Svcs (ndd) [Entry date 04/10/97]

4/15/97	21	ORDER by Honorable David F. Levi: CERTIFYING the fact that the constitutionality of an act of Congress has been drawn into question (cc: all counsel) (vc)
4/16/97	–	LODGED Stipulation and Order that this action maintain as a class action (ch1)
4/16/97	22	ANSWER by defendant CA Dept Social Svcs, defendant Pete Wilson, defendant Craig Brown (ch1)
4/16/97	–	DECLARATION of Bruce Wagstaff in opposition to request for preliminary injunction [6-1], [6-2] (ch1)
4/16/97	25	MEMORANDUM by defendants Eloise Anderson, CA Dept Social Svcs, Pete Wilson, Craig Brown in opposition to application for preliminary injunction [6-1] (gk) [Entry date 04/17/97]
4/16/97	26	DECLARATION of Bruce Wagstaff in opposition to motion for preliminary injunction [6-1] (gk) [Entry date 04/17/97]
4/16/97	27	DECLARATION of Theodore Garelis in opposition to request for preliminary injunction [6-1] (gk) [Entry date 04/17/97]
4/17/97	23	APPLICATION AND ORDER by Honorable David F. Levi ORDERING that CA State Senators Ray Haynes, Rob Hurtt and Richard Rainey; CA State Assembly members Steve Baldwin, Howard Kaloogian, Bill Leonard, Tom McClintock, Bill Morrow, and Bernie Richter; the US Justice Foundation's application to file brief is GRANTED; Declaration of

		Senator Ray Haynes (cc: all counsel) (ndd)
4/17/97	24	BRIEF by Ray Haynes, Rob Hurtt, Richard Rainey, Steve Baldwin, Howard Kaloogian, Bill Leonard, Tom McClintock, Bill Morrow, Bernie Richter, US Justice Foundatio [sic] in opposition to Motion for Preliminary Injunction (ndd)
4/17/97	28	ORDER by Honorable David F. Levi: if the US wishes to file an amicus brief in this matter, the brief shall be filed by 5/5/97; it may be necessary to provide other parties with an opportunity to reply to the amicus brief in the event that such a brief is filed (cc: all counsel) (vc) [Entry date 04/18/97]
4/22/97	–	LODGED pro hac vice application and [proposed] order by pltfs Brenda Roe, Anna Doe (ljr) [Entry date 04/23/97]
4/23/97	29	STIPULATION AND ORDER by Honorable David F. Levi: that this action be maintained as a class action with a class of plts defined as: all present and future AFDC and TANF applicants and recipients who have applied or will apply for AFDC or TANF on or after 4/1/97, and who will be denied full CA AFDC or TANF benefits because they have not resided in CA for 12 consecutive months immediately preceding their application for aid; dfts consent that this court's TRO shall extend until such time as this court determines plts' pending motion for preliminary injunction, currently set to be heard on 5/16/97 (see Order for details) (cc: all counsel) (ndd)

4/24/97	30	ORDER by Honorable David F. Levi ORDERING application for pro hac vice appearance GRANTED; for pltfs Brenda Roe and Anna Doe to have attorney Martha F Davis appear pro hac vice (cc: all counsel) (vc)
4/24/97	31	NOTICE of no objection by dfts Eloise Anderson, CA Dept Social Svcs, Pete Wilson, Craig Brown to brief of Amici Curiae Haynes, Hurtt, Rainey, Baldwin, Kaloogian, Leonard, McClintock, Morrow, Richter and the US Justice Foundation [24-1] (ljr) [Entry date 04/25/97]
4/28/97	32	DECLARATION of David S. Schwartz in support of preliminary injunction [6-1] (gm) [Entry date 04/29/97]
4/28/97	33	DECLARATION of Joel F. Handler in support of preliminary injunction [6-1] (gm) [Entry date 04/29/97]
4/28/97	34	MEMORANDUM by plaintiff Brenda Roe in support of plaintiff's motion for preliminary injunction [6-1] (gm) [Entry date 04/29/97]
4/30/97	35	NOTICE OF ERRATA re Declaration of David S. Schwartz [33-1] (ndd) [Entry date 05/01/97]
5/5/97	36	SUR-REPLY by Eloise Anderson, CA Dept Social Svcs, Pete Wilson, Craig Brown regarding application for preliminary injunction [29-1] (gk) [Entry date 05/06/97]
6/4/97	37	MEMORANDUM, Opinion and Order: by Honorable David F. Levi ORDERING pltf's motion for preliminary injunction

is GRANTED; pending judgment in this action, dfts and their agents, assignees, and successors in interest are enjoined from implementing: 1) section 11450.03(a) of the CA Welfare and Institutions Code; 2) regulations promulgated pursuant to section 11450.03(a) of the CA Welfare and Institutions Code (cc: all counsel) (ch1)

6/6/97	–	LODGED Document not to be signed (gk) [Entry date 06/10/97]
7/2/97	38	STATEMENT by dfts CA Dept Social Svcs, Pete Wilson, Craig Brown, Eloise Anderson of issue on appeal (kdc) [Entry date 07/03/97]
7/2/97	39	REPRESENTATION STATEMENT by dfts Eloise Anderson, CA Dept Social Svcs, Pete Wilson, Craig Brown (kdc) [Entry date 07/03/97]
7/2/97	40	NOTICE OF APPEAL by dfts Eloise Anderson, CA Dept Social Svcs, Pete Wilson, Craig Brown from District Court 6/4/97 decision granting a preliminary injunction (fee status paid) (bb) [Entry date 07/07/97]
7/15/97	41	MAILED case information/docket fee payment notice copy of Notice of Appeal to 9th Circuit Court of Appeals copy of appeal and certified copy of docket sheet to all parties appealling [sic] the court's 6/4/97 order (gk)
7/15/97	42	CERTIFICATE OF RECORD transmitted to 9th Circuit [40-1] (notice sent) (gk)

7/18/97	43	REQUEST by plaintiffs for publication of decision (kdc) [Entry date 07/22/97]
7/21/97	44	TRANSCRIPT DESIGNATION and Ordering Form for dates 5/16/97 hearing on pltfs motion for preliminary injunction re appeal [40-1] (ch1) [Entry date 07/23/97]
7/24/97	45	NOTIFICATION by 9th Circuit of Appellate Docket Number 97-16326 app order/jgm 7/2/97 (ljr) [Entry date 07/28/97]
7/24/97	46	OPPOSITION by dfts to 'pltfs' request for publication of dicision [sic] [43-1] (ljr) [Entry date 07/28/97]
7/30/97	47	ORDER from 9th Circuit re appeal [40-1]; within 7 days of filing ntoice [sic] of appeal; parties shall make arrangements to obtain fro [sic] court reporter official transcript of proceedings in the district court; opening brief due 7/30/97; answering brief due 8/27/97; optional reply brief due within 14 days of service of answering brief (bb) [Entry date 08/01/97]
11/3/97	48	CLERK'S record on appeal transmitted to 9th Circuit original case file one volume of Clerk's Records and one expando, certified copy of docket mailed to 9th Circuit regarding appeal [40-1] (cc: all counsel) (ndd)
11/18/97	-	RECEIPT of for 1 volume of clerk's record and no transcripts by Ninth Circuit (mp) [Entry date 11/19/97]

4/22/98	49	ORDER from 9th Circuit the decision of the District Court [40-1] is AFFIRMED (kdc)
7/22/98	50	NOTICE regarding return of case file by CA 9th (gm) [Entry date 07/23/98]

Docket Entries

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRENDA ROE, et al.,
Plaintiffs-Appellees,

v.

ELOISE ANDERSON, et al.,
Defendants-Appellants.

No. 97-16326

DATE FILINGS – PROCEEDINGS

7/21/97 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. Referred to MOATT pursuant to FRAP 3.3 [97-16326] (gva)

7/21/97 Filed certificate of record on appeal N/RT filed in DC; dated 7/15/97 (Casefiles) [97-16326] (gva)

7/23/97 Filed attorney for Appellant Civil Appeals Docketing Statement served on 7/2/97 (to CONFATT) [97-16326] [97-16326] (mhf)

7/29/97 Filed order MOATT (PP) This appeal is a preliminary injunction appeal. Accordingly, 9th Cir R. 3-3 shall apply. W/in 7 days of filing the noa, the parties shall make arrangements to obtain rts. Aplt's opening brf is due 7/30/97; the answr brf is due 8/27/97 & the opt rpy brf is due w/in 14 days of serv of the answr brf. The appeal & any mtns pending at the time

brfg is completed shall be referred to the next mtns panel for disposition [97-16326] (mhf)

7/31/97 Filed Calif State Senators's motion to become amicus curiae in support of aplts w/ltr of consent by aplts only; served on 7/29/97 [MOATT per promo] [97-16326] (mhf)

8/1/97 Filed original and 15 copies Appellant Eloise Anderson, Appellant CA Dept. of S.S. Appellant Pete Wilson, Appellant Craig L. Brown opening brief (Informal: n) 31 pages and five excerpts of record in 1 volumes [sic]; served on 7/30/97 [97-16326] (ft)

8/1/97 Filed Aplts' request for oral argument & for decision by a merits panel; served on 7/30/97 [MOATT] [97-16326] (mhf)

8/4/97 Received WA Legal Foundation, U.S. Representatives John T. Doolittle & Stephen Horn, Calif Senators K. Maurice Johannessen, David G. Kelley, Tim Leslie, Bruce McPherson, & Richard L. Mountjoy; & the Allied Educational Foundation's brief in 15 copies of 29 pages; deficient: (mtn pending); served on 7/30/97 (4 copies of br/w mtn to MOATT) (recd orig consent ltrs from both ptys) [97-16326] (mhf)

8/11/97 Filed Aples' opposition to aplts req for decision by a merits panel & for oral argument; served on 8/8/97 (MOATT) [97-16326] (mhf)

8/15/97 Case released from Pre-Briefing Conference program. (ah)

8/27/97 Filed original and 15 copies appellee Brenda Roe, Anna Doe's 41 pages brief, 1 Exc. vols; served on 8/26/97 (4 copies of Brfs & Exc to MOATT) [97-16326] (mhf)

9/11/97 Rec'd errata to brief from Appellant Eloise Anderson, Appellant CA Dept. of S.S., Appellant Pete Wilson, Appellant Craig L. Brown, served 9/10/97 (RECORDS) [97-16326] (mhf)

9/15/97 Filed original and 15 copies Eloise Anderson, CA Dept. of S.S., Pete Wilson, Craig L. Brown reply brief, (Informal: n) 16 pages; served on 9/12/97 [97-16326] (mhf)

9/22/97 Calendar check performed [97-16326] (mw)

9/25/97 Filed order (Cynthia H. HALL, Melvin BRUNETTI, Sidney R. THOMAS): This preliminary injunction appeal is referred to the next available merits panel for disposition. Accordingly, the appeal shall be placed on the calendar during the week of 12/8/97 in SF, CA. Aplt's req for oral arugment [sic], California State Senators' mtn for leave to file an amicus brf & the brf of amicus WA Legal Foundation, et al. recd on 8/4/97 are referred to the merits panel. [97-16326] (mhf)

10/3/97 Received ltr dtd 9/29/97 from the US Dept of Justice stating csl Mr. Bensing is no longer works there & is not csl of rec [97-16326] (mhf)

10/14/97 Calendar materials being prepared. [97-16326] [97-16326] (uk)

10/22/97 CALENDARED: San Francisco December 11, 1997 9:00 a.m. Courtroom 1 [97-16326] (mw)

11/4/97 Filed, as of 7/21/97, certified record on appeal in 2 Vols. (total): 1 Clerks Rec -0- RTs (ORIG) & 1 Expando) [97-16326] (mhf)

11/25/97 Filed order (Deputy Clerk: eu) The merits panel to which this appeal is assigned directs that the req for oral argument be GRANTED. [97-16326] (mhf)

12/11/97 ARGUED AND SUBMITTED TO Betty B. FLETCHER, Thomas G. NELSON, CJJ: Robert H. Whaley, DJ. [97-16326] (mw)

12/15/97 Filed order (Betty B. FLETCHER, Thomas G. NELSON, Robert H. Whaley): The amicus suriae [sic] brfs of the Washington Legal Foundation, et al. & Calif State Senator Ray Haynes, et al. are ordered filed. [97-16326] (mhf)

1/28/98 FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Betty B. FLETCHER, author; Thomas G. NELSON; Robert H. Whaley.) FILED AND ENTERED JUDGMENT. [97-16326] (mhf)

2/17/98 Filed original and 4 copies Appellant Eloise Anderson, Appellant CA Dept. of S.S., Appellant Pete Wilson, Appellant Craig L. Brown petition for rehearing, (PANEL) 12 p. pages, served on 2/13/98 [97-16326] (mhf)

4/10/98 Filed order (Betty B. FLETCHER, Thomas G. NELSON, Robert H. Whaley,): The pet for rhrg is DENIED. [97-16326] (mhf)

4/17/98 MANDATE ISSUED [97-16326] (mhf)

7/27/98 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 98-97 filed on 7/21/98. [97-16326] (tsp)

10/5/98 Filed Supreme Court order (SC Date: 9/29/98) The US Justice Foundation, et al.'s mtn for leave to file a brf as amicus curiae is GRANTED. The mtn of WA Legal Foundation, et al. for leave too [sic] file abrf as amicus curiae is GRANTED.

The pet for a writ of cert is GRANTED. The brf of petitioner is to be filed w/the clk &

served upon opposing csl on or before 3:00 p.m. Tuesday, 11/10/98. The brf of respondents is to be filed w/the clk & served upon opposing csl on or before 3:00 p.m. Tuesday, 11/8/98. A rpy brf if any is to be filed w/the clk & served upon opposing csl or or [sic] before 3:00 p.m., Tuesday, 12/29/98. Rule 29.2 does not apply [97-16326] (mhf)

Proposition 165 (Excerpts)

* * *

SECTION 7. Section 11450 of the Welfare and Institutions Code is amended, to read:

11450. (a)(1) *For the first six months that aid is paid,* aid shall be paid for each needy family, which shall include all eligible brothers and sisters of each eligible applicant or recipient child and the parents of the children, but shall not include unborn children, or recipients of aid under Chapter 3 (commencing with Section 12000), qualified for aid under this chapter. In determining the amount of aid paid, the family's income exclusive of any amounts considered exempt as income or paid pursuant to subdivision (e) or Section 11453.1 shall be deducted from the sum specified in Section 11452, as adjusted ~~for cost of living increases~~ pursuant to Section 11453 ~~and paragraph (3) of subdivision (a) of Section 11450-11496~~. In no case shall the amount of aid paid for each month exceed the sum specified in the following table, as adjusted ~~for cost of living increases~~ pursuant to Section 11453~~.05 and paragraph (2) of subdivision (a) of Section 11450~~, plus any special needs, as specified in subdivision ~~(e),~~ and (f):

Number of eligible needy persons in the same home:	Maximum Aid
1	$ ~~326~~ $ 293
2	~~535~~ 482
3	~~663~~ 597
4	~~788~~ 709
5	~~899~~ 809
6	~~1,010~~ 909
7	~~1,100~~ 998
8	~~2,209~~ 1,088
9	~~1,306~~ 1,175
10	~~1,403~~ 1,263

Payments shall be made under this paragraph only when the family has not received aid under this Section for a period of twenty-four (24) consecutive months prior to the first month of aid.

~~If, when, and during such time as the United States government increases or decreases its contributions in assistance of needy children in this state above or below the amount paid on July 1, 1973, the amounts specified in the above table shall be increased or decreased by an amount equal to that increase or decrease by the United States government, provided that no increase or decrease shall be subject to subsequent adjustment pursuant to Section 11453.~~

(2) After aid has been received for any six months pursuant to paragraph (1), the maximum aid for the seventh and subsequent months shall be reduced by 15 percent of the amounts specified in paragraph (1), as adjusted in accordance with Section 11453.05. This reduction shall not be applied to families in which all parents or other caretaker relatives living in the home are age 60 or over, or are disabled and receiving

benefits pursuant to Section 12200 or Section 12300 or where the caretaker is a non-needy non-parent relative, or, where all parents in the assistance unit are under the age of 19 and regularly attending school at the high school level or lower or an equivalent vocational or technical training program.

(b) For purposes of determining the maximum aid payment as specified in subdivision (a), the family size shall not be increased for a child who was conceived while either the father or the mother of the child was receiving aid under this section, until the family has not received aid under this section for a period of twenty-four (24) consecutive months.

(c) Notwithstanding the maximum aid payments as specified in subdivision (a), families who have resided in this state for less than twelve (12) months shall be paid an amount calculated in accordance with subdivision (a), but not to exceed the maximum aid payment that could have been received from the state of prior residence.

* * *

To determine proper benefit levels under this statute the state would have to keep track of at least 66 different grant levels in other states according to the Congressional Budget Office.

There is no evidence to support the theory that California is a welfare magnet. 85% of children receiving AFDC were born in California – while only 75% of California children are natives. (1984 report of the nonpartisan Legislative Analyst).

All County Letter 97-11,
Dated February 28, 1997 (Excerpts)

STATE OF CALIFORNIA – PETE WILSON, *Governor*
HEALTH AND WELFARE AGENCY

DEPARTMENT OF SOCIAL SERVICES [Seal]
744 P Street, Sacramento, CA 95814

February 28, 1997
ALL COUNTY LETTER 97-11

REASON FOR THIS TRANSMITTAL

- [ ] State Law Change
- [X] Federal Law or Regulation Change
- [ ] Court Order
- [ ] Clarification Requested by One or More Counties
- [ ] Initiated by CDSS

TO: ALL COUNTY WELFARE DIRECTORS

SUBJECT: IMPLEMENTATION OF THE RELOCATION FAMILY GRANT (RFG) PAYMENT IN THE AID TO FAMILIES WITH DEPENDENT CHILDREN (AFDC) PROGRAM

REFERENCES: WELFARE AND INSTITUTIONS CODE (WIC) SECTION 11450.03 MPP SECTION 89-110.4

This letter provides the instructions, information and materials County Welfare Departments (CWDs) will need to implement the regulations governing Relocation Family Grant (RFG). Each county shall implement RFG by April 1, 1997.

Regulations in MPP Section 89-110.4 implement the provisions of WIC Section 11450.03 which restrict the grant amount to either the California computed grant, or the Maximum Aid Payment (MAP) amount from the prior state of residence (plus California special needs, if applicable) whichever is less. RFG provides that when an Assistance Unit (AU) does not contain any member who has lived in California for at least 12 consecutive months, the AU's grant will be determined on the basis of RFG. RFG will continue to apply until at least one member of the AU has resided in California for 12 consecutive months. RFG applies prospectively to applications filed on or after the date RFG is effective in the county.

BACKGROUND

Implementation of RFG was initially effective on December 1, 1992. With the case of *Green v. Anderson*, filed in the Sacramento U.S. District Court on December 21, 1992, the California State Department of Social Services (CDSS) was enjoined from ongoing implementation. The *Green* case was appealed to the U.S. Supreme Court and dismissed as not ready for decision because the *Beno v. Shalala* case had previously invalidated that portion of the California Work Pays Demonstration Project waiver necessary to implement RFG. The RFG regulations now in effect, state: In accordance with the *Green v. Anderson* court order, this provision shall not be implemented until a determination by a court of appropriate jurisdiction allows such implementation.

The U.S. Department of Health and Human Services' certification of California's State Plan for Provision of

Public Assistance Under the Personal Responsibility and Work Opportunity Act of 1996 dated October 9, 1996, and effective November 26, 1996, makes Welfare and Institutions Code Section 11450.03 operative and now provides CDSS with the necessary authority to proceed with implementation of RFG.

DISCUSSION/QUESTIONS AND ANSWERS/COMPUTATION EXAMPLES

ATTACHMENT 1 lists a series of questions and answers that have been developed to assist CWDs in implementing RFG regulations. Examples for computing and determining grant amounts under RFG are also included.

TABLE OF MAXIMUM AID PAYMENT (MAP) LEVELS FOR ALL STATES

ATTACHMENT 2 provides a table of state maximum benefit amounts by family size. The table must be used to compare the California computed grant amount for which an applicant is eligible to the MAP the applicant would have been eligible to receive had he/she continued to live in his/her prior state of residence.

FORMS

ATTACHMENT 3 provides a complete listing of all necessary forms and their use in implementing RFG regulations. Availability of state-produced stock for the English and, where appropriate, the Spanish version of the form is indicated. Camera-ready copies of the forms

may be obtained by calling the Forms Management or Language Services Bureau as indicated below in the contact portion of this letter.

ATTACHMENT 4 provides a reproducible copy of TEMP 2136 entitled Relocation Family Grant – Supplemental Statement of Facts. Stock of the TEMP 2136 may be ordered from the CDSS Warehouse upon your receipt of the Notice of Change Form (GEN 127) that is issued when stock is available. The final TEMP 2136 will be printed back to back in English and Spanish.

NOTICES OF ACTION (NOAs) and NA FORMS

ATTACHMENT 5A provides two Notices of Action (NOAs) for use as the Approval and Change actions. Copies of the NOA messages in Cambodian, Chinese, Spanish and Vietnamese may be obtained upon request through the Language Services Bureau approximately 30 days from the date of this letter.

ATTACHMENT 5B provides copies of the NA forms in the Asian languages only may be obtained trough the Language Services Bureau. Spanish versions of the NA forms are available through the Forms Management Bureau.

AUTOMATED TRACKING

Enhancements to MEDS for purposes of RFG online tracking are underway. Programming, however, may not be completed by the effective date. Until such time that online tracking is available, all RFG cases will need to be flagged manually. Identifying information must consist of

the date the applicant moved to California, and name of the recipients prior state of residence.

CA 215 – NOTIFICATION OF INTERCOUNTY TRANSFER

When transferring an RFG case to another county, annotate on the Notification of Intercounty Transfer (CA 215) that the RFG rules apply, the name of the prior state and date that the RFG period expires.

CA 30 – AFDC BUDGET WORKSHEET

On Line C of the CA 30, the prior state's aid payment plus California's special needs payment must be figured in the comparison of the aid payment calculation.

CONTACTS

If you have any questions regarding this letter or need additional information, please contact the following staff:

Subject	Contact person	Telephone
Regulations/ Implementation	Alison Garcia	(916)654-0989 or CALNET 464-0989
Forms	Elizabeth Allred	(916)657-3350 or CALNET 437-3350
NOAs/NA Forms	Pam Kian	(916)654-1801 or CALNET 464-1801
Camera-ready	Forms	(916)657-1907 or

Copies English and Spanish	Management	CALNET 437-1907
Translations	Language Services	(916)654-1505 or CALNET 434-1305

Sincerely,

/s/ Bruce Wagstaff
BRUCE WAGSTAFF
Deputy Director
Welfare Programs Division

Attachments

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* * *

Attachment 2 – MAP Table from Other States

AFDC TABLE OF STATE MAXIMUM BENEFIT AMOUNTS BY FAMILY SIZE

STATE	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
Alabama	111	137	164	194	225	252	287	315	344	372	400	428	457	485	513	541	541	541
Alaska	514	821	923	1025	1127	1229	1331	1433	1535	1637	1739	1841	1943	2045	2147	2249	2351	2453
Arizona	204	275	347	418	489	561	632	703	775	846	917	988	1060	1131	1202	1274	1346	1418
Arkansas	81	162	204	247	288	331	373	415	457	457	457	457	457	457	457	457	457	457
Colorado	214	280	356	432	512	590	652	715	778	840	902	959	1016	1072	1129	1186	1243	1308
Connecticut	358	473	581	683	781	884	987	1102	1193	1304	1359	1489	1527	1643	1744	1799	1882	1966
Delaware	201	270	338	407	475	544	612	681	750	819	888	957	1026	1095	1164	1233	1302	1371
Dist. of Col	265	330	420	513	591	695	797	881	968	1053	1111	1194	1248	1316	1366	1434	1574	1618
Florida	180	241	303	364	426	487	549	610	671	733	795	857	918	981	1043	1105	1167	1229
Georgia	155	235	280	330	378	410	444	470	496	530	568	568	568	568	568	568	568	568
Hawaii	418	565	712	859	1006	1153	1300	1445	1593	1740	1887	2034	2181	2328	2475	2621	2767	2913
Idaho	205	251	317	382	448	513	579	645	710	776	841	906	971	1036	1101	1166	1231	1296
Illinois	212	283	382	424	495	550	589	624	655	689	725	761	801	842	886	931	979	1030
Indiana	139	229	286	346	405	483	522	580	~~699~~	697	762	827	892	957	1022	1087	1152	1217
Iowa	183	361	426	495	648	610	670	731	791	865	952	1039	1126	1213	1300	1387	1474	1561
Kansas	241	326	403	471	532	593	664	715	776	837	898	959	1020	1081	1142	1203	1264	1325
Kentucky	196	225	262	328	383	432	482	482	482	482	482	482	482	482	482	482	482	482
Louisiana	72	138	190	234	277	316	352	301	427	482	501	540	580	620	662	707	741	789
Maine	108	312	418	526	632	730	845	953	1060	1167	1274	1381	1489	1595	1702	1805	1918	2023
Maryland	165	202	373	450	521	573	645	709	766	826	886	946	1004	1063	1124	1184	1282	1342
Massachusetts	352	466	579	666	760	854	945	1037	1128	1220	1315	1410	1505	1600	1695	1790	1885	1980
Michigan	276	371	459	563	659	792	853	944	1020	1096	1172	1248	1324	1400	1476	1552	1628	1704
Minnesota	250	437	532	621	697	773	850	916	980	1035	1089	1142	1195	1249	1301	1354	1407	1450
Mississippi	60	95	120	144	168	192	215	240	264	288	312	336	360	384	408	432	456	480
Missouri	138	234	292	342	386	431	474	514	554	595	635	675	715	755	795	835	875	915
Montana	252	338	425	511	597	684	771	857	900	941	977	1013	1046	1076	1106	1132	1132	1132
Nebraska	222	293	364	435	506	577	648	719	790	861	932	1003	1074	1145	1216	1287	1358	1429
Nevada	229	288	348	408	468	527	587	647	706	766	826	885	945	1005	1065	1124	1184	1244
New Hampshire	414	481	550	613	673	754	817	910	952	1039	1126	1198	1265	1332	1399	1465	1533	1600
New Jersey	162	322	424	488	552	616	677	728	778	828	878	928	978	1028	1078	1128	1178	1228
New Mexico	227	304	381	458	534	611	688	764	841	918	995	1071	1148	1225	1302	1331	1360	1389
New York	327	429	524	619	716	787	901	979	1039	1059	1159	1219	1279	1339	1399	1459	1519	1579
North Carolina	181	236	272	297	324	349	373	386	406	430	448	473	496	521	546	571	596	621
North Dakota	223	333	431	517	591	653	702	739	776	813	850	887	924	961	998	1035	1072	1109
Ohio	203	279	341	421	493	548	613	680	746	816	881	949	1016	1082	1150	1234	1318	1402
Oklahoma	190	238	307	380	445	509	574	631	685	685	685	685	685	685	685	685	685	685
Oregon	310	395	460	565	680	785	840	925	985	1090	1195	1300	1405	1510	1615	1720	1825	1930
Pennsylvania	215	330	421	514	607	687	770	853	935	1019	1102	1185	1268	1351	1434	1517	1600	1683
Rhode Island	327	451	566	636	714	805	886	978	1050	1140	1220	1301	1383	1469	1550	1635	1722	1808
South Carolina	118	159	200	241	281	322	363	403	444	484	525	565	606	645	687	727	768	808
South Dakota	304	380	430	478	526	578	627	675	724	773	822	872	920	969	1018	1067	1115	1164
Tennessee	95	142	185	226	264	305	345	386	425	467	508	549	589	630	670	711	750	790
Texas	78	163	188	226	251	288	313	356	382	425	451	494	520	563	589	632	675	713
Utah	246	342	425	498	567	625	654	685	717	747	778	809	840	870	902	933	965	994
Vermont	445	553	656	738	827	884	953	1069	1148	1228	1307	1387	1465	1546	1625	1705	1784	1864
Virginia	174	257	322	388	457	509	570	638	692	754	815	876	937	998	1059	1120	1181	1242
Washington	349	440	546	642	740	841	971	1075	1075	1075	1075	1075	1075	1075	1075	1075	1075	1075
West Virginia	149	209	261	328	376	437	486	509	509	509	509	509	509	509	509	509	509	509
Wisconsin	246	440	518	618	709	766	820	878	921	943	963	983	1003	1023	1043	1063	1083	1103
Wyoming	195	320	360	390	450	510	575	640	700	765	777	789	801	813	825	837	849	861

2/19/97

BEST AVAILABLE COPY

Proposition 165 Petition Materials (Excerpts)

[Seal] GOVERNOR PETE WILSON

DEAR MR SHAPIRO:

California government spending is on autopilot and welfare spending is out of control.

Welfare costs are growing at four times the rate of our population and combined spending for welfare and related health services now consumes more of our state budget than anything except education.

Unless we control welfare costs *now,* California faces the virtual certainty of continued escalating spending.

Already California, with only 12% of the nation's population, pays 26% of the welfare costs paid by all states nationwide!

This threatens higher taxes *and* drastic cuts in education and other vital state programs.

I have enclosed an official petition to place a constitutional amendment on the November ballot which will help prevent this disaster. It is called the Taxpayers Protection Act.

Please sign this important petition and return it in the postage paid envelope.

If there are other registered voters immediately available, please ask them to sign the petition also. But be certain to return your petition within 24 hours even if your signature is the only one.

The Taxpayers Protection Act will:

- ✓ **STOP** out of state welfare recipients from moving to California just to increase their grants.
- ✓ **ENCOURAGE** able bodied adult welfare recipients to find jobs, and to keep high school age parents in school.
- ✓ **DISCOURAGE** unwed welfare mothers from having additional children by placing a cap on the size of a family grant.
- ✓ **FORCE** the state government to pass a budget on time by docking the pay of the Governor and the legislature for each day they are late.
- ✓ **REQUIRE** welfare mothers to identify the fathers of their children so that dead-beat fathers pay for their children instead of the taxpayers.
- ✓ **PERMIT** the Governor to take effective action to *cut* the budget in emergencies.

Without your immediate help we will be unable to qualify this important initiative for the ballot.

And, if you possibly can, include a contribution of $3, $5 or even $10 to help print and distribute petitions. But the signatures are the most important, so please return your signed petition today.

How much will it cost you in higher taxes if the Taxpayers Protection Act fails? I believe that it will be hundreds of times more than $10.

Please return you signed petition today. Our future depends upon it. Remember, even one signature will really help.

With greatest urgency,

/s/ Pete Wilson
Pete Wilson
Governor of California

P.S. If you have already signed a Taxpayers Protection Act Petition do not sign this one in spaces 1-6. Do collect signatures from other voters in your household, your neighbors, friends or relatives and do fill out and sign the Declaration of Circulation. Even if you can only get one more signature today please send back your petition in the postage-paid reply envelope. And, please include a contribution of $3, $5 or $10 to help us print and distribute more petitions. Thank you.

Proposition 165 Campaign Materials (Excerpts)

CALIFORNIA The Budget/Welfare Reform Act of 1992 TAXPAYERS

Governor Pete Wilson, Chairman

KEY PROVISIONS OF PROPOSITION 165

Proposition 165 is a proposed constitutional amendment which will be submitted to the people of California on the November 1992 ballot. The initiative makes it easier for government to cut spending by reforming the budget process and eliminating automatic increases for welfare and other government spending except for education. Specifically, the measure:

* *DOCKS PAY FOR LATE BUDGET* – Requires legislators and the Governor to pass a budget by June 15 or forfeit their salary and reimbursement of expenses every day they are late;

* *HELPS END BUDGET IMPASSE* – If the budget is not enacted by July 1, the Governor can declare a fiscal emergency and propose spending reductions (except education) to bring the budget into balance. If the legislature does not act, the cuts would take effect after 30 days;

* *HELPS KEEP BUDGET IN BALANCE* – If spending exceeds revenues mid-year, the Governor can propose the necessary reductions (except education) to put the state back on track. If the legislature does not act, the cuts would take effect after 30 days;

* *MAKES INITIAL BUDGET PROPOSAL MORE ACCURATE* – Changes deadline for Governor to submit a budget from January 10 to March 1, giving the legislature a more accurate, timely budget proposal;

* *LIFTS LOCK ON REQUIRED SPENDING FOR STATE EMPLOYEES* – During a fiscal emergency, the governor may reduce state employee compensation by up to five percent if no contracts are in place;

* *LIMITS WELFARE PAYMENTS TO NEWCOMERS* – To reduce any incentive to come to California solely for higher welfare benefits, and to keep welfare costs under control, newcomers to California would receive the same level of grant they would have received in their home state;

* *REFORMS WELFARE SO THERE'S MORE INCENTIVE TO WORK* – Makes incremental cuts in welfare to encourage people to work. First, the grant is reduced ten percent, and then fifteen percent after six months for able-bodied welfare recipients. With additional food stamps, the net reduction in welfare benefits is 11 percent.

* *ENCOURAGES FAMILIES TO STAY TOGETHER* – Encourages teen mothers to stay at home when possible and refrain from setting up new welfare households until they have finished school and can support themselves.

* *ENCOURAGES TEEN PARENTS TO STAY IN SCHOOL* – Provides a $50 monthly cash benefit, child care, transportation and support for teen mothers on welfare who stay in school; reduces grant by $50 each month if they drop out.

* *DISCOURAGES MORE CHILDREN WHILE ON WELFARE* – To discourage people from having more children while on public aid, welfare recipients will not receive cash bonuses when they have more children.

* *SAVES MILLIONS OF DOLLARS AND REDUCES NEED TO RAISE TAXES OR CUT EDUCATION* – By reducing welfare costs and discouraging more people from going on welfare, the state will save $640 million in the first year alone, and be in a much better position to balance future budgets without new taxes, and without cutting education and preventive programs for children.

# # #

Proposition 165 Ballot Pamphlet (Excerpts)

Budget Process. Welfare.
Procedural and Substantive Changes.
Initiative Constitutional Amendment and Statute.

Argument in favor of Proposition 165

California's budget is out of control!

THIS YEAR CALIFORNIA WAS FORCED TO ISSUE IOU'S, NOT BECAUSE IT'S TAXING TOO LITTLE BUT BECAUSE IT'S SPENDING TOO MUCH – TOO MUCH ON THE WRONG THINGS. "Automatic" increases in spending for public assistance crowd out funding for schools, lowering California's bond rating, costing taxpayers millions.

By the year 2000, welfare related spending will crowd out colleges, prisons, and every function except schools. And without huge annual tax increases, it will even hurt schools.

Higher taxes are driving jobs and taxpayers out of state. WITHOUT IMMEDIATE REFORM, CALIFORNIA WILL HAVE MORE TAX USERS THAN TAXPAYERS BY 1993.

Welfare-related spending is now our second largest budget item and keeps climbing. Welfare rolls are growing four times faster than our population.

CALIFORNIA HAS 12% OF AMERICA'S POPULATION, BUT PAYS 26% OF WELFARE COSTS PAID BY ALL STATES NATIONWIDE.

Why? California is one of the most generous welfare states in America. WE PAY WELFARE RECIPIENTS *NEARLY TWICE* THE AVERAGE PAID BY OTHER

LARGE STATES. Between 1978 and 1988, CALIFORNIA WELFARE PAYMENTS GREW NEARLY TWICE AS FAST AS REAL FAMILY INCOME.

Is that fair to *your* family? How much more in taxes can you afford?

Opponents claim welfare payments are still too low but fail to include food stamps, health care, and benefits in their analysis. THE AVERAGE WELFARE RECIPIENT WOULD NEED A JOB PAYING $1,400 PER MONTH TO EARN MORE WORKING THAN STAYING ON WELFARE. No wonder people move to California to collect welfare.

Automatic welfare increases aren't the only problem. Budget stalemates and legislators who can't say no cost Californians billions.

Proposition 165 reforms the budget process:

- Docks Governor's and Legislators' pay when they fail to balance the budget on time.
- Gives our Governor similar "last resort" budget-balancing tools governors in 44 other states already have. THE GOVERNOR CAN'T RAISE TAXES OR CUT EDUCATION. ALL HIS ACTIONS ARE SUBJECT TO LEGISLATIVE OVERRIDE.

Proposition 165 reforms welfare:

- New state residents would receive no more in welfare here than in their home state, to end California's status as a welfare magnet.
- Cash grants would be lowered 10%, and an additional 15% for long-term able-bodied

recipients, still leaving California as one of the most generous states in the nation, but reducing incentive to stay on welfare. The greater reduction for long-term able-bodied recipients MOVES WELFARE BACK TOWARDS ITS ORIGINAL PURPOSE AS A *TEMPORARY SAFETY NET*, NOT A PERMANENT WAY OF LIFE. When increased food stamps are considered, welfare recipients could replace their entire cut by working just 6.4 hours per week.

- Recipients will no longer receive additional cash for having additional children after going on welfare, although they will receive medical benefits and food stamps for the additional child.
- PROPOSITION 165 PROTECTS EDUCATION AND OUR KIDS' FUTURE.

Join the California Taxpayers Association, Howard Jarvis Taxpayers Association, California Chamber of Commerce, and over one million Californians who've given their name to support Proposition 165.

PETE WILSON
Governor
State of California

JOEL FOX
President
Howard Jarvis Taxpayers Association

MAUREEN DIMARCO
Secretary of Child Development and Education
State of California

Rebuttal to Argument in Favor of Proposition 165

We usually learn the hidden consequences of ballot measures after it's too late. We can't let that happen with 165.

UNPRECEDENTED POWERS

Promoters say the legislature can overrule the Governor's new powers. Actually, Section 5, paragraph 12.5 says the Governor *must personally approve* any override attempt.

Promoters say 44 other Governors have the same power: Actually, no Governor has 165's unrestrained ability to act without legislative or court review.

Promoters say 165 won't hurt education. This year the Governor tried to cut school funding $2.3 billion. Under Section 5, paragraph 12.2 no one could stop any Governor from making such cuts.

NOT REFORM

Promoters say 165 reforms welfare. But real reform would include job creation, training and child care and would deal with welfare fraud. 165 doesn't.

Promoters say families on welfare receive the equivalent of $1,400 monthly. Actually, the average mother with two young children gets $663 a month and $142 in food stamps.

What promoters don't tell you is that 165 also raises health costs for working families and aged, blind and disabled, makes it tougher for elderly to avoid premature

placement in nursing homes and cuts foster home funding.

NOT THE ANSWER

165 Doesn't answer our fiscal crisis. Most 165 cuts come from poor families with young children (AFDC). That entire program accounts for just 6% of the state budget.

TELL THE POLITICIANS YOU DON'T LIKE THE HIDDEN CONSEQUENCES IN THEIR BALLOT MEASURE.

NO ON 165

MARILYN ERICKSEN
Executive Director,
California Child, Youth & Family Coalition

GLORIA BLACKWELL
President,
California State Parent Teacher Association (PTA)

GORDON A. KOOLMAN
President,
California Association of Highway Patrolmen

Argument Against Proposition 165

Don't be misled.

Proposition 165 will NOT do what its backers claim.

They claim 165 is welfare "reform". But it really is a giant step backward that inflicts new hardships on our most vulnerable children, elderly and disabled.

They claim 165 is budget "reform". But buried within 165's long, complex provisions is a constitutional power grab giving this or any future Governor dangerous and unprecedented new powers.

ATTACKING POOR CHILDREN, THE ELDERLY AND DISABLED

Proposition 165 attempts to exploit public concern over welfare by including a few provisions designed to appeal to voters. But these provisions fail to mask 165's constitutional power grab and punitive attacks on those who need help the most.

Read 165 carefully. Underneath all the rhetoric, you'll find that:

- 165 WON'T PUT WELFARE RECIPIENTS TO WORK. 165 imposes no new work requirement on welfare recipients and offers them no new help in getting a job. It simply punishes everyone who can't find work. No child care for single mothers. No job training or placement. No jobs. Just a 25% cut.
- 165 HURTS THOSE WHO NEED HELP THE MOST. 165 eliminates cost of living increases for foster homes, and for needy aged, blind and disabled Californians who have nowhere else to turn. And it makes access to Medi-Cal more difficult for the working poor and seniors who need nursing home care.
- 165 WON'T REDUCE WELFARE FRAUD AND WASTE. Look for yourself. You will not find a single provision eliminating fraud or making welfare administration more efficient.

HOW THE POWER GRAB WORKS

165 allows the Governor to unilaterally declare emergencies under conditions of his own making.

Under 165, FISCAL EMERGENCIES WOULD NOT JUST HAPPEN, THEY COULD BE MADE TO HAPPEN. If the Governor's own political appointees overestimate revenues by just 3% the Governor can declare an emergency. Or if the Governor prevents the state budget from being adopted on time by refusing to work toward consensus, he can declare an emergency.

After declaring an emergency, THE GOVERNOR CAN REDUCE VIRTUALLY *ANY* STATE SUPPORTED SERVICE BY *ANY* AMOUNT.

Every service not protected by the constitution is at risk:

- Enforcement of laws protecting consumers, the environment and workers on the job.
- Higher education and schools beyond the minimum Proposition 98 guarantee.
- Fighting AIDS and providing essential health services.
- Homecare and other services for the disabled and elderly.
- Funds to local government for trial courts, health care and children's services.

Once funding is cut, NEITHER THE LEGISLATURE NOR THE COURTS CAN OVERTURN THE GOVERNOR. Under 165 the Governor's action can be overturned *only if the Governor agrees.*

A Governor intent on controlling the state could coerce the legislature, regulatory agencies and even local governments into submission merely by *threatening* to use the arbitrary, unrestrained powers granted by Proposition 165.

165 OVERTURNS THE CONSTITUTIONAL CHECKS AND BALANCES WE RELY ON TO PROTECT OUR FREEDOM.

NO ONE PERSON SHOULD HAVE THIS MUCH UNRESTRAINED POWER, EVER.

PLEASE JOIN WITH US TO DEFEAT THIS DANGEROUS AND HURTFUL POWER GRAB.

VOTE NO ON PROPOSITION 165.

ROBYN C. PRUDHOMME-BAUER
President,
League of Women Voters of California

REVEREND LES L. SAUER
Executive Committee, California
Council of Churches

JOHN F. ALLARD
Board Member,
National Council of Senior Citizens

Rebuttal to Argument Against Proposition 165

Consider who's opposing Proposition 165; public employee unions, the welfare lobby and special interests who benefit from higher taxes and more government spending.

They're not concerned with your rights as taxpayers.

They're saying "Be happy with the way welfare works now."

Some are even suing our state to double California's already very high welfare grant.

They're not concerned with power grabs – they're really concerned about their own spending programs.

PROP 165 LEAVES ALL CONSTITUTIONAL CHECKS AND BALANCES IN PLACE:

- Gives Governor "last resort" budget-balancing authority similar to governors in 44 other states, and then only if legislators fail to balance the budget.
- EXEMPTS SCHOOLS FROM CUTS.
- GIVES GOVERNOR *NO* POWER TO RAISE TAXES.
- LEGISLATURE *CAN* OVERRIDE HIM.
- THE COURTS' POWERS REMAIN UNCHANGED.

PROP 165:

- Restructures the system so it pays to get a job rather than just collect welfare.
- Complements *already existing* job training and child care programs for welfare mothers.
- Offers teenage welfare mothers child care and cash incentives to stay in school
- Has *no* effect on costs or access to health care for poor children, elderly and disabled.

OPPONENTS CLAIM A 25% WELFARE CUT, BUT WHEN ADDITIONAL FOOD STAMPS ARE CONSIDERED, THE CUT IS ONLY 11% – AND WE'LL STILL BE PAYING AMONG THE HIGHEST GRANTS IN AMERICA.

Prop 165 stops automatic increases in spending and taxes, avoids Washington-style deficits for California, protects education, and saves millions by forcing politicians to pass a budget on time, or permanently forfeit their salary every day they're late.

RUSSELL S. GOULD
Secretary of Health and Welfare
State of California

INGRID AZVEDO
Former Chair
Federal Council on Aging

JOHN A. ARGUELLES
Retired Justice
California Supreme Court

Proposition 165 Waiver Request (Excerpts)

[SEAL]
PETE WILSON
GOVERNOR

TELEPHONE [Omitted]
FAX [Omitted]

STATE OF CALIFORNIA
HEALTH AND WELFARE AGENCY
1600 NINTH STREET, ROOM
SACRAMENTO 95814

May 19, 1992

Jo Anne Barnhart, Assistant Secretary
Administration for Children and Families
U.S. Department of Health and Human Services
370 L'Enfant Promenade, S.W.
Washington, D.C. 20447

Dear Ms. Barnhart:

Attached is California's Welfare Reform package demonstration project proposal pursuant to Section 1315 of Title 42 of the United States Code which has been the topic of discussion during our meetings this past winter. Due to our anticipation that State legislation will be enacted shortly in support of the provisions, we request that the package be reviewed and any identified issues be resolved as soon as possible. In the meantime, we will continue to work with members of your staff on details of the evaluation design.

This proposal is a historic attempt to alter the policy underpinnings of California's welfare program. Proposal components are aimed at providing work incentives, promoting individual responsibility, supporting/reinforcing the policy of family preservation, and addressing disturbing trends relates [sic] to teen pregnancy and school dropouts. We believe all of these problems significantly contribute to the growing phenomenon of government

dependency. If successful, the proposal will help hundreds of thousands of Californians to reduce or eliminate their dependence on governmental support. California's welfare population is growing at an alarming rate with increases of more than ten percent per year. Less than eight percent of AFDC recipients have earned income. The current AFDC program has very few built-in incentives to work and, in most cases, works as a disincentive for able-bodied recipients to find and maintain employment. The result is that welfare recipients are relegated to a life style dependent on government support, without opportunity to realize their true potential and become productive contributing members of our society. The proposed changes will enhance and motivate these people to become self-supporting and to break the cycle of dependency. This will result in tremendous personal benefit to these individuals and their families and also address several very perplexing State/national economic societal problems.

We recognize that financial incentives to work may not be enough for some recipients, especially those who lack job search skills and those who are simply having trouble finding work on their own. To address this, we are also proposing a new JOBS component to provide voluntary up-front job club workshops to recipients in their first six months on aid who are not being served by GAIN. As you know, job club workshops have been proven to be cost-effective in the past and we believe that they will prove extremely beneficial when combined with significant financial incentives to work. We believe that the proposed job clubs will be more beneficial on a solely volunteer basis. The individuals subject to the grant

reductions under this proposal will be highly motivated to increase earned income through work and will volunteer. It is under this basic concept that we are requesting waiver of the good cause, conciliation and sanction sections of the Federal laws and regulations for these job club workshops. We intend that these workshops be a strong, positive support of our work incentives. We also believe that our current GAIN (JOBS) program can be better tailored to serve clients in the new more work-oriented AFDC environment that will result from our proposal. Thus, we are currently exploring several options for redesigning GAIN to make it more work-oriented.

CALIFORNIA RELOCATION GRANT

The proposal reduces the incentive for families to migrate to California for the purpose of obtaining higher aid payments. This would be accomplished by limiting (for a 12-month period) the grant level for families moving to California to the lesser of California's grant level or the MAP of the State of previous residence.

MAXIMUM FAMILY GRANT

The proposal encourages family responsibility by capping the MAP to exclude any children conceived while the mother or father was receiving aid. It is important to note that such children would be counted in determining the appropriate MBSAC for the family and would be covered by Medicaid.

TRANSITIONAL GRANT

As indicated above, the proposal would reduce a family's MAP after six months on aid by 15 percent. We believe that it is important to provide six months of financial assistance at the higher transitional level in order to allow able-bodied adult recipients to overcome temporary economic and family setbacks.

To facilitate expeditious review of the proposal, we have separately addressed each proposal component. If you have any concerns about any of the concepts, we would like to discuss them with you as soon as possible in order to assure a rapid approval date. Questions should be directed to me at (916) 654-3345, or John Healy, Interim Director of the Department of Social Services, at (916) 657-2598. Questions concerning Medicaid should be directed to John Rodriguez, Chief Deputy Director of Programs, Department of Health Services at (916) 654-0391.

Sincerely,

/s/ Russell S. Gould
RUSSELL S. GOULD
Secretary

Attachments

cc: Ms. Christine Nye, Director
Medicaid Bureau
Health Care Financing Administration
East High Rise Building, Room 200
6325 Security Blvd.
Baltimore, MD 21207

Ms. Mary Kennison, Director
Office of Demonstrations
and Evaluations
Health Care Financing Administration
2430 Park Meadows Building
6325 Security Blvd.
Baltimore, MD 21207

Mr. Lawrence L. McDonough
Associate Regional Administrator
Division of Medicaid
Health Care Financing Administration
75 Hawthorne Street, Fourth Floor
San Francisco, CA 94105

Sharon Fujii
Regional Administrator
Administration for Children and Families
50 United Nations Plaza, Room 450
San Francisco, CA 94102

* * *

CALIFORNIA RELOCATION GRANT

PROPOSAL:

- Families moving to California will receive grants, for their first 12 months in California, no larger than the maximum aid payment they would have received/did receive in the state from which they moved.
- If the family's state of origin had higher grant levels than California has, then the grant received in California will not exceed California's grant level.
- Families living in California for more than 12 months are not affected.
- The amount of time spent in California while not on aid counts against the 12-month timeframe.

OBJECTIVE:

- Reduce the incentive for migration of families to California for the purpose of obtaining higher aid payments.

HYPOTHESIS:

- If California's grant levels for incoming applicants are changed to the lesser of California's computed grant amount or the maximum aid payment of the State of prior residence, the rate of relocation into California will be reduced.

* * *

California Relocation Grant

BACKGROUND

Current law provides for one grant amount per family size for all recipients regardless of how long the recipient has resided in the state.

PROBLEM

Approximately 7% (50,000 cases) of California's AFDC caseload lived in another state within the previous twelve months prior to their application for aid in this state. About half (25,000 cases) were receiving AFDC in the prior state of residence. About 25% of the migrating recipients come from neighboring states (Washington, Oregon, Nevada, and Arizona) and 36% come from states that make up the nation's ten lowest grant payment states.

PROPOSAL

Limit the MAP of families moving to California to the lesser of California's grant level or the MAP of the prior state of residence until the family has been in the state for a twelve-month period. This will reduce the California MAP to levels consistent with the aid which would have been received in the state of prior residence and will reduce the incentive to relocate in California solely for the purpose of receiving an increased AFDC grant.

CASELOAD & COST/SAVINGS

Seven percent of all new applicant cases in California each month, or almost 2,300 cases, will receive a lower grant for 6 months. For 1992-93, this equates to an average 9,000 monthly cases that will be affected.

Total FY 1992/93 *savings* (AFDC grant savings) $25,811,000 less admin cost

December 19, 1991, Legislative Analyst
Report To Assemblymember Quackenbush

Joint Legislative Budget Committee

[Committee Members' Names Omitted In Printing]

GOVERNMENT CODE SECTIONS 9140-9143

CALIFORNIA LEGISLATURE

LEGISLATIVE ANALYST
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December 19, 1991

Hon. Charles W. Quackenbush
Assembly Member, 22nd District
Room 2111, State Capitol
Sacramento, California 95814

Dear Assembly Member Chuck Quackenbush:

This letter is in response to your request that we prepare a fiscal analysis of your AB 671. Specifically, this bill would require that any persons applying for public assistance in California, and who received public assistance as a resident of another state, shall receive a grant that is no more than the grant they would have received in their state of origin during the first six months of residence in California. This proposal to create a "two-tier" grant system would apply to various health and welfare programs in California, primarily Aid to Families with Dependent Children (AFDC), Supplemental Security Income/State Supplementary Program (SSI/SSP), General Assistance (GA), and Medi-Cal.

Our response is divided into three sections. The first section provides some background on the programs affected by your two-tier grant proposal, the second section discusses its fiscal effects, and the third section discusses some of the public policy issues that might affect the proposal.

While AB 671 would apply to numerous health and welfare programs, we are limiting our fiscal analysis to the major programs – AFDC, SSI/SSP, GA, *and* Medi-Cal.

BACKGROUND

Current law establishes AFDC and SSI/SSP grant levels by family size (AFDC) and category of disability (SSI/SSP), and specifies that those grants must be reduced to reflect income. The cost is shared by the federal and state governments and, for the AFDC Program, the counties. Grants are not adjusted based on (1) how long a recipient has resided in California or (2) whether a recipient had received public assistance in another state.

The GA payments are established by each county and are funded entirely by county funds. While each county uses somewhat different criteria for establishing their GA grant, most large counties set their grant at approximately the AFDC grant for a comparable family size (most GA cases have only one person).

Two-tier proposals have surfaced in other states; generally where the AFDC or GA grants are high compared to surrounding states. The concern driving these policy proposals is that people receiving assistance in low-benefit states are encouraged to move to high-benefit states in order to take advantage of the higher benefit. In effect,

the high-benefit state becomes a so-called "welfare magnet." Two-tier grants are thought to mitigate migration incentives.

FISCAL EFFECTS OF THE PROPOSAL

In this section we discuss the fiscal effects of your proposal. Key to understanding the fiscal effects, however, is development of accurate estimates of the affected caseload.

How Large is the Affected Population?

Estimating the caseload that would be subject to your proposal is difficult for two reasons. First, the Department of Social Services (DSS) does not collect information regularly on the former residency of welfare applicants, and county welfare offices are not required to identify in their records whether the recipient came from another state. Second, there is no federal or other interstate data base that indicates whether applicants for public assistance were on assistance in their former state.

Academic Studies. Our review of the academic literature indicates that some studies have identified movement between states by low-income families in order to take advantage of higher public assistance benefits. The amount of movement identified in these studies generally is small. These findings, however, are subject to some criticism based on the statistical methods and data used in the studies. We also note that questions can be raised about whether movers are actually better off in the high-

grant states since these states generally also have a higher cost of living.

State Surveys. During the decade of the 1980s, three states were sufficiently concerned about welfare migration that they commissioned studies in order to determine the amount of movement to their states due to high public assistance grants.

- *Michigan.* In 1981, Michigan surveyed all individuals that applied for AFDC and GA during the month of August. Michigan's study concluded that about 3.4 percent of all applicants *for both GA and AFDC* may have migrated in order to obtain higher aid payments.

- *Minnesota.* The Minnesota Legislative Auditor studied welfare migration using surveys taken in August and November of 1986. Using the same criteria as the Michigan study, they found that about 6.4 percent of applicants exhibited a "high probability" of having moved to Minnesota in order to receive higher aid payments.

- *Wisconsin.* The Wisconsin Magnet Study Committee surveyed applicants for public assistance in June 1986. Using a different methodology than Michigan and Minnesota, they found that about 7.2 percent of applicants were "most likely" to have moved to Wisconsin in order to receive higher aid.

California-Specific Data. The above surveys were aimed at determining the behavioral impact of interstate grant disparities. For purposes of estimating the fiscal impact of AB 671, however, we do not need to know why people migrated, but only that they did migrate and were on assistance in their former state. The state does have

some information on these factors. For instance, the DSS, in their April 1990 AFDC "characteristics" survey, reports data from their sample regarding the residence of recipients. Based on those case records that included former residency and aid status, we estimate that about 4.4 percent of California's April 1990 AFDC caseload was comprised of recent migrants who had been on assistance in their former state. Given that counties will approve about 23,700 AFDC cases per month during 1991-92, this means that 1,043 cases per month would be affected by your proposal. Over the course of a year, about 75,000 case months (new and continuing cases) in the AFDC Program would be affected.

It is important to understand that this estimate is subject to significant uncertainty. For instance, the estimate assumes that all new arrivals apply for AFDC immediately upon arrival in California (therefore experiencing a full six months of grant reduction). This assumption, therefore, leads to an *overstatement* of the caseload affected by your proposal. On the other hand, the estimate assumes no reduction in cases due to the effect of the proposal on deterring migration. This assumption results in an *understatement* of the caseload impact.

Fiscal Analysis

AFDC and GA Programs

Grant Savings. If grants for new arrivals are reduced for a full six months each, we estimate that this proposal would result in full-year AFDC benefit savings of about $20 million ($9.5 million General Fund, $10

million federal funds, and $500,000 county funds) annually. These estimates assume an average grant differential estimated by the DSS using information from the April 1990 characteristics survey. This estimate, however, is based on a very small sample. Actual savings would vary depending on the actual state of origin of new arrivals. Additionally, these estimates are sensitive to the average number of months for which new arrivals receive reduced grants (as mentioned above, we assumed six months of reduced grant for each recipient subject to your proposal). For example, if grants for new arrivals are reduced for an average of three months, the estimated AFDC General Fund savings would be about $4.8 million annually.

This proposal also would result in unknown annual county savings, possibly more than $5 million, for GA programs. This estimate is subject to great uncertainty because we have no data with which to determine either (1) how many GA applicants are new arrivals or (2) how county GA grants compare to those in other states. Our estimate assumes that GA recipients have the same mobility as AFDC recipients and that GA grants are reduced by $50 per month for a full six months. California's average monthly GA caseload was about 110,000 cases per month in 1990-91 and was comprised primarily of single adults. The average GA grant in 1990-91 was about $307 per month per case.

Your proposal would also result in unknown, possibly more than $1 million, annual General Fund savings from reduced special needs (such as the $70 per month paid to pregnant mothers) and homeless assistance benefits. Finally, as noted, additional unknown savings would

be realized to the extent the proposal deters migration. (We comment on this below.)

County Administrative Costs. This proposal would result in unknown, possibly more than $5 million ($1.75 million General Fund, $2.5 million federal funds, and $750,000 county funds), annual costs to administer a two-tier grant program for AFDC. These costs would result from the additional effort needed to (1) verify whether the applicant has previously received public assistance in another state and (2) determine the applicant's AFDC grant based on the former state's benefit. To the extent the county costs are not offset by grant savings, they would be state-reimbursable.

In addition, the counties would incur unknown, probably more than $600,000, costs annually to administer the two-tier grant program for GA. These costs could be substantially higher if former state aid status proves difficult to determine. Again, any county costs that are not offset by reduced GA costs would be state-reimbursable.

State Administrative Costs. As we discuss below, this proposal may require a federal waiver in order to implement two-tier grants for the AFDC Program (including a waiver of the federal maintenance-of-effort requirements). The state would incur unknown, probably more than $200,000, General Fund costs to apply for, monitor, and evaluate the federal waiver, and to process fair hearing requests from newly arrived applicants that are denied California grants.

SSI/SSP Program

Grant Savings. If grants for new arrivals are reduced for a full six months each, we estimate that this proposal would result in full-year SSI/SSP benefit savings of about $12 million to $15 million annually to the General Fund. An unknown – but probably small – percentage of these savings might be offset by additional costs to the Department of Developmental Services to compensate for reductions in SSI/SSP reimbursements to the department.

This estimate is subject to considerable uncertainty because we have no information about the movement of SSI/SSP recipients or applicants between states. The estimate assumes that SSI/SSP recipients have the same "migration" rate as AFDC recipients. In addition, this estimate is subject to the same qualifications that we noted with respect to our estimate for the AFDC Program.

Administrative Costs. This proposal would result in unknown, possibly more than $500,000, General Fund costs annually. Unlike AFDC, SSI/SSP is administrated by the U.S. Social Security Administration (SSA) and is subject to their regulations. It is likely that determining residency status for current recipients that move from one state to another would be relatively easy because the SSA maintains a national data base of its recipients. It is unclear, however, whether the SSA would fund the additional costs necessary to make determinations of aid status in other states for SSI/SSP applicants that might have been on some other form of public assistance in their state of origin. We also note that federal regulations

include limits regarding the number of state option variations (eligibility criteria) from the federal SSI Program that the SSA will administer. These administrative costs issues could be addressed in the waiver request.

Medi-Cal Program

Health Benefit Savings. Your proposal could also result in costs or savings to the Medi-Cal Program, depending on federal action. This is because the AFDC maximum aid payment (MAP) is generally used to determine Medi-Cal eligibility for medically needy beneficiaries. Specifically, some individuals who are not eligible for AFDC can become eligible for Medi-Cal if their medical expenses require them to "spend down" their incomes to 133$^1/_3$ percent of the MAP. The difference between their incomes and 133$^1/_3$ percent of the MAP is their "share of costs."

If the Legislature reduced the MAP for persons from outside the state, medically needy beneficiaries would have higher shares of cost because they would have to spend down their incomes to a lower level. An increase in a person's share of cost reduces the portion of medical expenditures covered by Medi-Cal, thereby reducing Medi-Cal costs. These costs are unknown, but probably would be less than $1 million. It is not clear, however, whether the federal government would permit California to have a two-tier eligibility determination system for Medi-Cal.

In addition, we should note that when the Legislature and the administration reduced AFDC grants this year, they agreed not to reduce the income level on which

Medi-Cal eligibility is based. If (1) the Legislature chose not to reduce the standard for Medi-Cal eligibility determination in your proposal, but (2) the federal government approved the two-tier approach, then the federal government would probably not provide federal funding for the difference between the cost of the two-tier approach and the cost of leaving Medi-Cal eligibility untouched by your proposal. These costs would then be 100 percent General Fund.

Administrative Costs. In order to determine residency and public assistance status for medically needy persons, counties would incur additional administrative costs. Given a lack of data, we are unable to estimate their costs.

PUBLIC POLICY CONSIDERATIONS

Your two-tier grant proposal raises many basic policy questions. Among the more significant are the following.

Is This Proposal Legal?

Current federal law prevents states from imposing a residency requirement that would preclude recent arrivals in a state from receiving AFDC benefits until the residency requirement is fulfilled. Further, states are precluded from reducing AFDC grants below specified levels. The maintenance-of-effort levels are the grant levels that were in effect in May 1988. Similar requirements apply to SSI/SSP. While these provisions have never been tested in order to determine whether they apply to a two-tier grant proposal, it is possible they

would. Thus, it is likely that the DSS would need a federal waiver of those statutes prior to implementing your proposal.

There is, however, some doubt that a federal demonstration waiver could be obtained. In 1989, the State of Wisconsin submitted a draft waiver proposal to the U.S. Department of Health and Human Services (DHHS). The department has yet to act on the proposal. Discussions with the DHHS staff familiar with the Wisconsin proposal suggest that a waiver for a two-tier grant demonstration might be difficult to obtain. Their reasoning is that, based on a series of U.S. Supreme Court cases, such a proposal could be challenged on constitutional grounds.

Earlier this year, the Minnesota Department of Human Services examined the literature on migration of welfare recipients and the legal basis for imposing a two-tier grant system (among other options to deal with "welfare" migration). They concluded that two-tier grants could be successfully challenged on equal protection and other constitutional grounds.

Will This Proposal Reduce Migration?

The state surveys mentioned above examined in detail the reasons why public assistance recipients move from one state to another. Each survey (except California's, which did not survey recipients) discovered that there are many reasons for moving. Among the most common reasons given were (1) living and environmental considerations, (2) being closer to family and friends, or (3) seeking work. Nonwelfare recipients typically give similar reasons for moving from one state to another. To

the extent these reasons dominate considerations to move, reduced grants for new arrivals may not appreciably reduce migration for those families and individuals that end up on public assistance.

Can We Track GA Applicants to Their Former State?

A successful two-tier grant program would likely require that county public assistance administrators verify public assistance status in the applicant's former state of residence. It may be relatively easy to determine aid status for those applicants that received AFDC or SSI-SSP in another state, since every state operates these program [sic] with similar federal reporting requirements. This may not be possible, however, for GA recipients since GA programs differ significantly from state to state and do not have federal reporting requirements. In addition, it may be more difficult to determine whether GA applicants have been in California for less than six months because of the mobility of many GA recipients.

What is Your Intent Regarding Prior Receipt of Public Assistance?

Your proposal states that "any person who has received any form of public aid or public social services as a resident of another state" would be subject to a reduced grant. This indicates that persons would be subject to the lower grant level if they had received assistance in their prior state *at anytime* during their life. It is not clear to us, however, whether this was your intent.

We welcome the opportunity to meet with you and your staff to discuss the above response. Should you have any questions, please call David Illig or Chuck Lieberman of my staff at 322-8406.

Sincerely,

/s/ Liz
Elizabeth G. Hill
Legislative Analyst

March 9, 1992, California Assembly Floor Debate And Vote On SB 366 (Excerpts)

* * *

Clerk: Senate Bill 366. An act relating to Aid to Families with Dependant Children making appropriation therefore and declaring an urgency thereof to take effect immediately.

Speaker: Mr. Costa, on the bill.

Mr. Costa: Yes, Mr. Speaker and Members,

* * *

Realizing that in fact funds are short in California today, it makes a great deal of sense then to insure that incentives are provided for people from other parts of the country, in fact that who might be lured to California if in fact there is evidence to make that case, that people might be willing to come here for the purpose – to benefit from higher assistance. This legislation attempts to take care of that by requiring a one year residency requirement in California for anyone to benefit from the level of assistance that we now provide for people who are residents of California.

* * *

Speaker: Mr. Bates.

Mr. Bates: Mr. Speaker and Members, I rise to oppose this measure. The situation here is that we are blaming the wrong people for what's going on in our society and in our economy. You have a situation where nation-wide people are becoming more and more unemployed as the economy is not working for people. We

now know that in the area of Los Angeles, one out of every seven people who reside in Los Angeles County are on some kind of assistance. Things are falling apart. Things are going to hell in a hand basket. And to some how or other think that the immigrants are the problem is really to deceive oneself. We have an economy that's in terrible disrepair, and so we must ask ourselves, why are immigrants coming to California? Well, they're coming here just as anyone else is coming here. They are coming here because they perceive there are opportunities here. They are coming here because there is a social network that can receive them. They are not coming here for any perceived welfare benefit increases that they somehow or other could get by coming to California. So we are deceiving ourselves if we think somehow or other people are coming to California for welfare benefits. There is no study, there's no analysis, there's no anything that would point out that people are coming here. They're coming here because they have friends here. They're coming here because they hope they can get a job here. They're coming here because they think they can get a better life for themselves and their families. Or in some cases, they are coming here because they are in a terrible situation where you have a women [sic] who has been battered and wants to get out of the area and wants to have a new life and a new opportunity. That's why people are coming to California. This Bill sends a message that says if you're poor, your [sic] down trodden, California doesn't want you. We don't want you to come here, we want you to go someplace else, the land of opportunity is not a land of opportunity for people who are poor. I think that's a wrong message, it doesn't save any money and I think its simply

demogoging [sic] a point that will mean nothing in the long run.

Speaker: Mr. Nolan.

Mr. Nolan: Yes Mr. Speaker, point of order, I think this Bill is improperly before the House, there is no author. There is no senator as an author of this Bill.

Speaker: Mr. Costa is the floor jockey.

Mr. Nolan: No, no, there is no senator . . . this Bill is improperly . . .

Mr. Costa: The Bill is the property of the House, Mr. Nolan. We had a Bill last year that was under similar circumstances and it has a principle co-author, its [sic] the property of this House and we can choose to use it as a vehicle as we do any other vehicle.

Mr. Nolan: My point would be that there is no senator listed anywhere on this Bill, this is a senate bill, it therefore cannot be considered.

Speaker: We had precedence for this last year, I recall a bill by Ms. Morgan. That's a fair question Mr. Nolan, so you'll have the section. Mr. Polanco.

Mr. Polanco: Mr. Speaker and Members, I rise to ask my colleagues not to support this measure. The two million that is identified as cost savings can be in fact two million dollars that we can get from elsewhere. The premise of SB 366 is premised upon disproved myths about California being a welfare magnet. There is no study that documents this to be the case. In fact, the figures that are out there today will show that California

is experiencing no greater an increase in its welfare caseload than other states across the country. The fact of the matter is Members, is that we are in a deep recession. The fact of the matter is, is that there are a million people in California without work. The fact of the matter is, is that unless we turn around this economy we are not going to be able to bring forward the type of prosperity. To pick on the welfare recipient is nothing more . . .

Speaker: Mr. Polanco, let me help you please. Members, please give Mr. Polanco your attention. Mr. Burden, please, Mr. Nolan.

Mr. Polanco: To continue to pick on the welfare recipient is nothing more than a callous, calculated scape goat. If in fact we are interested in wanting to improve and bring about the necessary change in welfare, then we ought to be targeting communities with resources, with assessments so that people can have an opportunity whereby we can assess their skills. Whereby we can begin to provide job opportunities. But the fact of the matter is Members, is that in California a mere seventy thousand new jobs will be created and as the economic trend continues Members, we are going to see middle class America run out of benefits, middle class America having to go to those lines and we are seeing it today. They will increase in numbers, this is a bad proposal, this is a very cheap shot at a population whom sixty percent are children. It is not the type of message that we ought to send to Californians. I ask for a no vote.

Speaker: Mr. Johnson.

Mr. Johnson: Mr. Speaker and Members, I couldn't disagree more with what Mr. Polanco has said

but I think he's right in the conclusion that he reaches that this Bill deserves a no vote. We ought to be able to agree, all of us, Republicans, Democrats, liberals, conservatives, all of us ought to be able to agree that the welfare system in this state just simply does not work. Period. It doesn't work, it's a disgrace. We shouldn't have people suffering. I'm opposed to this Bill because I believe it is unconstitutional on its face. It has been put forward by a governor trying to wrap it in a whole series of issues in an initiative and it's now being supported by a great many democrats for precisely that reason – to defeat the initiative – because they are concerned about it. So the game that is being played here, and lets [sic] be honest, on the part of democrats – lets pass this because public opinion polls show that it's popular and we are confident that the courts are going to throw it out ultimately because it is unconstitutional. We'll have the absurd situation of people coming in to this country from Mexico, from Southeast Asia, from all over the world and being able to go on welfare, AFDC payments immediately the same as if they had lived in California all of their lives but we are going to deny those same level of benefits to people who come here from Arizona or Missouri or some other state. If we were to apply the same logic for example, to the payments that we provide to school districts on average daily attendance and say we're going to provide average daily attendance level for students whose families are long-term residents of California at a given level, but those who have moved recently from Missouri or Arkansas or Texas, we're only going to provide the level of support for the school districts for that child's education that would have been provided in the state that

they moved from. Obviously it's unconstitutional. This is an unconstitutional proposal that probably is going to pass by people who want to support the Governor, who believe we need to do something to reform welfare, and on the part of some who cynically say let's pass it – the courts are going to throw it out – it will weaken the opportunity for the Governor's initiative, should it qualify, to pass. Please vote no.

Speaker: Mr. Quackenbush.

Quackenbush: Question for Mr. Costa. Mr. Costa, where was this Bill amended to reflect all these provisions in it at this time? Was it amended in Human Services or was it amended here on the floor?

Mr. Costa: The measure was amended on the floor.

Quackenbush: Are you aware that it's a carbon copy of my Bill AB 2584, that's now on the Human Services Committee?

Mr. Costa: Well, than [sic] you should like it.

(laughter)

Quackenbush: I'm just curious, is this the moral equivalent of withdrawing a Bill from Committee? It that what it might be?

Mr. Costa: I don't believe so.

Quackenbush: I'd ask for an aye vote and wondering how I can get on as a co-author, Mr. Costa.

Mr. Costa: I would be more than happy to have you as a co-author.

Quackenbush: I could be the author.

Speaker: Mr. Burton.

Mr. Burton: Why don't you run for the Senate and then you could put your name on it and solve Mr. Nolan's problem. I would have to really agree with Mr. Johnson, I think this a very demeaning Bill to this House, it's a demeaning Bill to the process. We had a residency requirement put in a welfare reform bill some years ago that then Governor Reagan proposed – that was thrown out. What we are saying to children is, if your family happened to come here from another state looking for a job, and even found a job but was then layed [sic] off of that job, and there is no unemployment insurance; there is no other job opportunity, and to take care of your children you must be on welfare, that somehow their stomachs are a little bit smaller than the stomach of the person who lives next door who has lived in this State over a year; that their need for clothing for a young child going to school is a little bit less than the child living across the street who may also be on welfare through no fault of that child, because the parent has been unable to find a job; that somehow that clothing will be a little bit cheaper because they will have some sort of certificate saying they haven't been here a year. I don't intend to vote for this Bill because I think it demeans the process and really demeans this body that in my judgment will overwhelmingly pass the Bill.

Speaker: Mr. Peace.

Mr. Peace: Mr. Speaker, very briefly I would like to associate my remarks to Mr. Johnson who associated his remarks to Mr. Polanco and agree that in fact this

is much ado about nothing. It's a ludicrous proposal. Only I would disagree with the conclusion and say that because it is so ludicrous we ought to vote aye. And the reason that you ought to vote aye is it's one way to get one more ludicrous, silly, deceptive thing segregated away from the otherwise heinous and silly proposal the Governor has put forward for November so that we can talk about the real substantive silly things that he has proposed for November rather than talk about these other silly things that we all agree has no substantive dollar affect on the budget or on any impact of this stuff about people moving from left to right or anything else. So let's pass it, get it out of the way. We can try to tombstone it the Quackenbush Act if we like, and then we can deal specifically with the substance of the proposal the Governor – at least to this date – thinks he wants on the November ballot. Although I understand his political folks have been trying to encourage him to change his mind at this point. But let's hope he doesn't so we once and for all bring this issue to rest. I ask for an aye vote.

Speaker: Mr. Gotch.

Mr. Gotch: Mr. Speaker, thank you. Question for the author. Mr. Costa, question for the author.

Unidentified: Principal co-author.

Mr. Gotch: Yes, question for the principle co-author. Mr. Costa, it's not abundantly clear in reading the Bill that it's your intent to ensure that the California grant would in fact be the ceiling so that anyone who might come from another State that pays a higher grant, for Alaska wouldn't be receiving that state's grant but in fact would receive no more than the State of California. If it

doesn't become any clearer when we get to the Senate, would you object to an amendment that would so clarify?

Mr. Costa: No, the important thing is that the California level be the cap in terms of the highest amount that a recipient could receive. Your point that in Alaska the assistance is higher than that of California's as well as I think one or two other states, that those residents coming from that state would then in fact have to receive a higher benefit, it's stated in the language, and if leg. counsel wants it further clarified, or if we are not satisfied with the response, I will add further language that will make it crystal clear that in fact the California level is the cap and the highest that a recipient could receive.

Mr. Gotch: Thank you. Mr. Speaker, on my own time. It's certainly debateable [sic] whether the westward migration is in fact fueled by California as a welfare magnet. I doubt that's the case but none the less the passage of this Bill would certainly lay to rest that question and I would urge an aye vote on the Bill before us today. Thank you.

Mr. Speaker: Mr. Gotch, I just want to remind you that if this Bill goes back to the Senate it's for concurrence only it would not be eligible for amendments without going to conference committee.

Speaker: Mr. Wyman.

Mr. Wyman: Thank you Mr. Speaker and Members. I rise to support this measure.

* * *

[I]t is a legitimate response to the concern, to the fact that California has become a welfare magnet and that people

have come to this State because they see it as an opportunity to max out their welfare level of subsistence for themselves and those that they support – or at least on welfare – have supported by the State. So this is a measure that makes sense. It is part of a proposal that the Governor is putting on the ballot. Maybe this will be defeated so that it will be in its pure form and on the ballot.

* * *

And I think that our constituents in the very high percentiles that have been tested on this issue, wonder why there is any debate on this measure at all. This is excellent law, it should be adopted by this legislature and if this legislature sees not to, than [sic] I assure you it will be adopted in November. I ask for an aye vote.

Speaker: Mr. Harvey.

Mr. Harvey: Yes, Mr. Speaker and Members. I liked this Bill when it was a Quackenbush Bill and I still like it as a Costa Bill. I'd like it a lot better if you'd have accepted our six amendments to do so something real meaningful instead of just chipping at this today. We had six good amendments today that really would reform welfare in this State and get rid of those abusers but the democrats don't want to do that today so I'll take this little piece and take a step forward in this election year at least, and hope that you will join us later on this year to do what's deserving of people of the State of California and take all of our amendments. I'd ask for an aye vote.

Speaker: Mr. Connelly.

Mr. Connelly: Mr. Speaker and Members, very briefly. I'm speaking on this because the discussion has been so theoretical – constitutional or not – it's probably not –

* * *

there is something very real in this Bill. This Bill says that if people move here and if something happens and they go on welfare, they can't receive any more benefits than the state that they came from for twelve months. And for a lot of states that means a very low level. For some southern states it means a level as low as one hundred-twenty dollars a month for a women [sic] with two children. If she moved here this month as an example, with her husband and that husband fled, took off, abandoned her – real world things happen – and she was here with her two children, she could get no more than one hundred-twenty dollars a month to support those children for twelve months in the State of California. Whatever else you think about this Bill on theoretical basis, political strategy basis, somewhere inside of you you've got to know that there are going to be situations where this Bill applies in a fashion that is totally, totally unfair. And for that reason, no other, you ought to vote no.

Speaker: Any further question or debate? Hearing none, Mr. Costa, you may close.

Mr. Costa: Yes, Mr. Speaker and Members, I think there was a lot of comments that were made that all suggest some strong feelings as it relates to this legislation before us. But I think that when you examine everything before us in this legislation, you have to realize that we've made cuts that a lot of people would not concur

with. And when we don't have enough to keep the current system intact – as fraught as that system is with problems – it certainly doesn't make any sense to be expending it for others who are not yet even have come to California.

* * *

And we're balancing our budget on the backs of a lot of Californians that we would prefer in other ways not to have to do so.

* * *

Speaker: All debate having ceased, all time has expired. Clerk will please prepare the roll. It take [sic] fifty-four votes. All members vote who desire to vote. All members vote who desire to vote. Clerk will close the roll, tally the vote. Prepare to announce the vote. Ayes fifty-four, nos fourteen on the urgency, ayes fifty-four, nos fourteen on the Bill.

* * *

BASIC FACTS ABOUT AID TO POOR FAMILIES IN CALIFORNIA

Numbers receiving aid, July 1996

	Single or no parent	2-parent	Total
Persons	1,935,389	641,607	2,652,431
Families	718,546	158,370	952,351
Children	1,373,979	400,152	1,774,131

Maximum Aid Payments, AFDC, 1996-97

Family size	Oct.96	10/96 Exempt	1/97 Region 1	1/97 Region 2	1/97 Reg 1 Exempt	1/97 Reg 2 Exempt
1	$293	$326	$279	$265	$310	$295
2	$479	$535	$456	$434	$509	$484
3	$594	$663	$565	$538	$631	$600
4	$707	$788	$673	$641	$749	$712
5	$806	899	$767	$730	$855	$813
6	$905	1010	$861	$820	$961	$913
7	$994	1109	$946	$900	$1055	$1003
8	$1083	1209	$1030	$981	$1150	$1093

Region 1: Alameda, Contra Costa, Los Angeles, Marin, Monterey, Napa, Orange, San Diego, San Francisco, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, Solano, Sonoma, Ventura.
Region 2: All other counties
Exempt: Familes in which all adult caretakers are disabled or caring for disabled child

Miscellaneous characteristics:

Percent of caseload which have received a total of 5 or more years of assistance: 32% (10/94)
Percent of caseload which have received a total of 2 or more years of assistance: 65% (10/94)
Percent of caseload aided continuously more than 5 years: 21.5%
Average number of children per family: 2.
Percent of cases with 3 or fewer children: 88.8%
Percent of recipients who are not citizens: 14.6% (375,000 persons)
Ethnic breakdown by race of parent: White 25.9%; Black 17.4%; Hispanic 41.5%; Asian 9.0%
Percent of cases with child under 6: 66.4%
Percent of California AFDC households with housing subsidy: 8.6% (rank, 51st in U.S.)
Percent of AFDC households reporting earnings, 10/94: 9.8% (2-parent households = 22.9%)
Percent of AFDC households with work history: 89%
Percent of AFDC adults engaged in GAIN activity: 11%
Percent of non-exempt AFDC adults engaged in GAIN activity: 21%

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Declaration Of Robert Greenstein

Robert Greenstein, hereby declare as follows:

1. I am the Executive Director of the Center on Budget and Policy Priorities, a Washington, D.C.-based non-partisan, non-profit research center that examines the impact of federal and state government policies on low- and moderate-income families and individuals in the United States.

2. I have been involved in research, policy analysis, and policymaking on issues regarding low-income people and welfare programs for over 20 years. Between January 1979 and January 1981, I served as administrator of the federal Food and Nutrition Service. I was the chief executive officer at the United States Department of Agriculture in charge of managing all domestic food assistance programs, including the Food Stamp and school lunch programs. Prior to that time, I worked as a special assistant to the Secretary of Agriculture from March 1977 to January 1979. In that capacity, I was the USDA representative on inter-agency and White House task forces on welfare reform.

3. I founded the Center on Budget and Policy Priorities in 1981. Under my direction the Center has published hundreds of studies, issue papers, and analyses of welfare programs, poverty, hunger, homelessness, and other topics related to low-income people. On behalf of the Center, I have testified on numerous occasions before Congress and state legislative bodies, as well as federal agencies and commissions, as an expert on poverty and welfare issues. My recent work includes serving as a member of the federal Commission on Entitlement and

Tax Reform, testifying before the 104th Congress on federal welfare reform proposals, and serving on the District of Columbia Citizens Welfare Transformation Committee established by the Mayor. I currently serve on the Policy Advisory Board of the Urban Institute's recently created Federalism Project. The board is overseeing a major Urban Institute project to identify the state and local policy changes that will occur under welfare reform, as well as the impacts of these changes on low-income families and individuals.

4. Over the past two years, a major focus of the Center's work has been analysis of the federal welfare legislative proposals, including the bill that was ultimately enacted as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193. As the predecessors of the new law were under consideration by Congress and the President, the Center under my direction prepared extensive analyses of the provisions of the bills and their potential effects on poverty. Once the new law was enacted, the Center began to study and monitor its implementation in the states, since a key aspect of the new law is that it transferred broad authority over a range of policies from the federal government to the states. The Center established a division to focus on state-level welfare policies and the implementation of the new federal welfare legislation. That division now comprises six professional staff members, who monitor state welfare plans and legislation, collect and analyze numerical data, study published scholarly articles and unpublished papers, and remain in contact with state and local policymakers, academics and interested policy organizations from around the country. All of these methods

are regularly used by organizations engaged in policy analysis to monitor state and local policy decisions and effects of federal policies as they are implemented by states.

5. I am familiar with California's cash welfare program for families with children and how it treats families that move to California from other states. I am aware that pursuant to state legislation enacted in 1992 and implementing regulations promulgated in 1997, there now exists a "Relocation Family Grant," such that "families that have resided in this state for less than 12 months shall be paid an amount . . . not to exceed the maximum aid payment that would have been received by that family from the prior state of residence." Welfare and Institutions Code Section 11450.03. Guidance to county welfare agencies on the implementation of this requirement from the California Department of Social Services states that the residency requirement applies to newcomers to California regardless of whether they received welfare benefits in their prior state. California Department of Social Services, All County Letter #97-11, February 28, 1997. The guidance to counties also states that a family's basic benefit will be determined by selecting the lower of a) the benefit the family would receive under California's benefit rules for longer-term residents (the "California computed grant"), not including special needs payments and b) the "Maximum Aid Payment" amount for a family of that size in its prior state. (In addition to basic benefits thus determined, newcomers to California would be eligible for special needs payments to the same degree as longer-term residents.) The guidance does not require California welfare agency officials to determine the actual

benefit a family would have received in its prior state, which may be lower than the maximum benefit due to factors such as a family's earnings, but rather the highest benefit that a family of that size could have received under the welfare program in the prior state.

Residency Requirement Will Reduce Benefits for Families that Move to California for Reasons Other than Welfare Benefits

6. The California residency requirement contains no mechanisms to distinguish between families that have come to California for higher benefits and those that move to California for other reasons. The most recent data from the California Department of Social Services shows that 33.5 percent of the recently arrived California AFDC recipients had received welfare benefits prior to moving to California, while 46.1 percent had not received welfare benefits. For 20.4 percent of the families, the survey did not reveal whether the family had received AFDC benefits in the prior state. California Department of Social Services, Aid to Families with Dependent Children Characteristics Survey, Study Month of April 1993, Table 23. This means that among the families for whom the welfare status in the prior state of residence was known, just 42 percent had received welfare benefits. While these data do not address directly the reasons for moving to California, they strongly suggest that many families move with no expectation of receiving welfare benefits. Thus, the residency requirement will limit the welfare benefits of many families that move to California but are not the intended target of the legislation. In addition, the requirement will limit a family's welfare

benefit to the level in another state even for long-term California residents that move out of state for as little as one month and then return to California. This may include, for example, a family from California who moved to another state briefly but returns home to California to flee an abusive relationship.

Variations in States' Welfare Programs Under the New Welfare Law will Undermine the Rationale and Workability of the Relocation Family Grant

7. California's Relocation Family Grant provision was designed in 1992 in the context of the AFDC program, but it is a poor "fit" for the new system put into effect by the 1996 federal welfare law. The rationale for the Relocation Family Grant appears to be to provide families no more than the welfare benefits they would have received in their previous state of residence. The new federal law, however, has fundamentally changed the welfare system; under the new structure, it becomes virtually impossible to achieve this result through the mechanism of the Relocation Family Grant. The federal law repealed the AFDC program and enacted the Temporary Assistance to Needy Families block grant in its place. Under AFDC, state welfare programs shared many key characteristics, because AFDC program rules were governed to a great extent by federal statute and regulations. States were allowed some flexibility over some of their AFDC rules, particularly with respect to benefit levels. Under conditions set forth in federal law and by the Secretary of Health and Human Services, states also were allowed to operate under rules that varied from federal rules by submitting a request for a waiver from these

rules to HHS. Even with these variations from federal rules, however, basic features of program design were common across states. In virtually all cases, families participating in AFDC were eligible for a cash grant. In addition, under the AFDC system states were required to submit detailed information to HHS on their AFDC program features, including both those allowed under the basic law and those approved in the waiver process.

8. The TANF block grant, on the other hand, is a funding stream with a limited number of federal requirements. As is the case with block grants generally, states can use TANF funds for a variety of purposes, including but not limited to providing cash assistance. States can use TANF funds to create new programs, to fund existing programs, to pay for services, and to provide assistance in ways other than through basic cash grants. Even when TANF funds are used to provide cash assistance, states can establish benefit rules in virtually any way they deem appropriate. Many states already are taking advantage of the flexibility under the TANF block grant to create programs that differ significantly from AFDC and from welfare programs in other states.

9. Another important distinction between AFDC and TANF is that states face minimal requirements to report to the federal government on the uses of TANF block grant funds. States must file a "state plan" with HHS, though there are few requirements for the contents of these plans. For example, states are not required to identify benefit levels or other key features of programs funded with TANF dollars. There also is no federal requirement that states file amended plans or otherwise

report to HHS changes in the design of programs funded under TANF.

10. This new structure inevitably will result in wide interstate and intrastate variation in welfare programs, to a degree that was not possible under the AFDC program. This will make it very difficult for California officials to accurately identify for any newcomer family the payment level the family would have received in its prior state. In its All-County Letter of February 28, 1997, the California Department of Social Services apparently has attempted to simplify the complex task of identifying the appropriate aid payments for the particular family seeking aid by directing that newcomers be provided the "Maximum Aid Payment" payable in that state for their family size. This system could limit harm to families if DSS correctly identified the highest aid payment among all programs within the state. Yet, as explained in paragraphs 20 and 21, DSS did not correctly identify the highest benefit level of all programs in each state. This appears to be in large part the result of a failure to capture the complexity of each state's welfare system. As a result, some families that move to California will receive a lower benefit than they would have received in their prior state. These mistakes occurred at a time when states were still essentially operating their old AFDC programs. The difficulty in identifying the highest welfare benefits in every state will increase in the near future as states experiment with the design of welfare programs. This will in turn increase the likelihood of mistakes that will result in lower benefits for some newcomers than they would have received in their prior state.

11. One of the most immediate results of the very broad flexibility offered to states by the new welfare law is likely to be increasing intrastate variation in benefit amounts. Under AFDC, most states had a single maximum benefit amount for a given family size, applying statewide. A few states varied the maximum benefit region by region. The new federal law eliminated any requirement of a single statewide system. Under the new law, each state is free to vary the maximum benefit amounts within the state to any extent. For example, some states, such as Colorado and New York, are considering proposals to pass along their block grant funds to counties. The counties in these states would have authority to create their own county programs. Each county could have their own rules and their own benefit levels.

12. Other states are considering "privatizing" some or all aspects of their welfare systems by contracting out administration of various aspects to for-profit or not-for-profit firms. Texas, for example, has proposed contracting out a significant portion of its program administration. A state also could contract with a number of different firms for different geographic areas or within the same area. Under the new law, each state is free to allow private entities to set benefit levels, creating the potential for even more intrastate variation.

13. The new law allows states to run a number of different programs within each state. Thus, maximum benefit amounts may vary between programs, as well as between regions. Under the new law, states may fund any number of programs with TANF dollars, rather than following a single program design as was done under the AFDC program. Furthermore, the TANF statute includes

a "maintenance of effort" provision, requiring states to spend at least a designated amount of their own money as a condition of receiving the federal TANF funds. The state maintenance-of-effort money, however, may be spent for other, separate state programs than the programs funded with the federal TANF block grant. For example, in the state of Washington the governor has proposed establishing a separate program for families where the household head is either disabled or a non-parent over 50 years of age, or is the caretaker of a disabled child. The policy rationale is that the work requirements and time limits that apply to families that receive assistance from TANF-funded programs are not appropriate for these families. As states experiment further, they may find that multiple state-funded programs are desirable to allow them to meet the diverse needs of their low-income residents. There is no requirement that these different programs within a state have the same maximum benefit amount.

14. Intrastate variation in maximum benefits is only one of a host of program design options left to states under the TANF block grant. To the extent states take advantage of these options, the "Maximum Aid Payment" contemplated by the Relocation Family Grant provision will come to be less and less analogous to any measure that exists in a given state. For example, a state could design a program where a family received only a very small cash grant, but received housing, utilities, clothing and food in-kind or through voucher payments. To compare the California grant, which is expected to pay for all the family's basic needs; with the cash grant in this type of program, which may only be expected to pay for

incidentals, would lead to severely understating the benefits available to the family in its previous state of residence. Alternatively, California could attempt to place a value on the in-kind support received by the family, but this would require it to make difficult judgments, especially since the value of housing and other in-kind aid might vary widely in different parts of the state in question.

15. Another program design would be where a state sets a basic grant which is very low, but makes additional payments to families based on individualized criteria. The additional payments could be based on child support collected from an absent parent. They could be based on families' actual costs of housing, transportation, food or clothing. In Washington, D.C., there is a proposal that certain recipients who find jobs receive a "bonus" payment. The "basic" grant in these systems would not be comparable to the California "Maximum Aid Payment." It would not be intended to meet all the family's needs, nor would it be the maximum amount of assistance families would be eligible to receive. Moreover, the actual amount of assistance could vary from family to family, sometimes based on local discretion, making it impossible to ascertain any figure comparable to the "Maximum Aid Payment."

16. Another program design receiving consideration in a number of states is to replace the system of cash benefits with jobs – either through private employers or government agencies – for at least some low-income families. These jobs would pay at least minimum wage and provide eligibility for the federal Earned Income Tax Credit. Additionally, some states operate a state-funded

Earned Income Tax Credit, for which such families would also be eligible. The state of Oregon operates a program whereby a family's welfare grant and the cash value of food stamps, instead of being paid to the family, are paid to an employer who hires a member of the family. A proposal in Wisconsin would have all eligible families with an able-bodied adult working either for a private employer or a government agency, with the wages subsidized by TANF funds. Under such systems, there would still be a cash assistance program, for recipients for whom an employer cannot be found, or where the adult is unable to work. If a family moved from such a state to California, California could consider the "Maximum Aid Payment" to be the maximum benefit in the cash assistance program. (This is apparently how California DSS is currently treating families form Oregon). However, this would not accurately account for the aid provided to a family in the work program, since the wages in the work program likely would be higher than the cash assistance grant. Alternatively, California could consider the "Maximum Aid Payment" to be the gross wages that a family could earn in the other state's work program, but that fails to take into account additional benefits the family would have received as a result of working, such as the Earned Income Tax Credit. An aid payment that is converted into a wage that then triggers eligibility for the Earned Income Tax Credit is not comparable to the kind of "Maximum Aid Payment" contemplated by the California Relocation Family Grant.

The New Welfare Law Will Make Monitoring Other States' Programs Untenable.

17. Exacerbating the problem of interstate and intrastate variation in benefit amounts and program designees are two additional difficulties. The first is that there is no longer any centralized repository of information about states' welfare programs or benefit levels. Under AFDC, each state reported to the U.S. Department of Health and Human Services its maximum benefit amount by family size, and these amounts for each state were readily available. Under the new law, no federal department collects this information, much less information about radical departures in program design. States are only required to file state TANF plans, which are not required to contain the information California would need to administer its Relocation Family Grant provision. Monitoring the maximum benefits for which newcomers to California would have been eligible in their prior state would require California to identify on its own all state and local entities with authority to set welfare benefits and all programs operated by these entities, and to sort out the program design differences in each of these jurisdictions.

18. The second additional difficulty is the probability of continuous change in states' programs. It is likely that these changes will be numerous over the next several years, as states take advantage of the flexibility granted them under the 1996 federal welfare law and as new programs are modified based on initial experiences. It is important to note that while some of these changes will occur as a result of state legislation that may be readily available in a law library, others will come about as a result of local ordinance, state or local regulations,

and decisions by local agencies or private companies. States are not required to file amendments to their TANF plans with the federal government when they make such changes. A typical pattern that many states are experiencing this year shows the amount of change that can be expected early in the process of the conversion from AFDC to TANF. Most states have already filed their TANF plans, some of which changed the states' AFDC systems. Now most states' legislatures are meeting, and considering additional changes. Some of the changes will be minor, some extensive. In most states, agencies administering TANF-funded programs will be left with a certain amount of discretion in implementing legislative directives, which in some states will bring about further changes. In this environment, it will be difficult or impossible for California DSS to track all changes in welfare benefits in all of these programs.

Administering the Relocation Family Grant Rule in the Context of the TANF System will Inevitably Cause California to Make Mistakes in Identifying the Maximum Grant for Families in Other States, and to Fail to Account for Differences Between Other States' Welfare Systems and California's System.

19. The wide-ranging variations in benefit amounts and program designs allowed by the new law, the rapidity of change, and the lack of any system of centralized reporting will make it implausible that California will accurately identify the maximum benefit for which a family would have been eligible in its previous state of residence. Indeed, the table of maximum state welfare benefit amounts that the California Department of Social

Services prepared for the April 1, 1997 implementation of the residency requirement, attached to All-County Letter #97-11, illustrates this problem. In an apparent effort to solve the problem of intrastate variation and to ease administration, the California Department of Social Services has identified only one maximum benefit level for families of a given size in each state. This effort at simplification would be appropriate if DSS were to correctly identify the highest maximum benefits from among all welfare programs in all regions in the state. That would mean that every affected family would be assured of receiving at least the benefit level it could have received in its prior state. Yet the DSS table does not show the highest welfare benefit among all programs within each state, which means that some families moving to California would receive a lower welfare benefit under the Relocation Family Grant than they would have received in their prior state.

20. The DSS table fails to identify the highest welfare benefit available in a number of states that have varying benefit levels, including Connecticut, Kansas, Michigan, New York, Virginia, and Wisconsin. In each case except Wisconsin, these are states in which welfare benefits vary regionally. The DSS table appears to show the benefit level for the largest city in the state, even if this is not the highest benefit level in the state. The Wisconsin benefit level appears to be the amount for families in the program that most closely resembles the former AFDC program: a program for families exempted from the work requirements. Yet families in Wisconsin with an adult who is considered able to work are placed in a work program under which benefits are somewhat

higher than in the program for families with a parent who is unable to work. In all of these states, the maximum benefit identified by California DSS is lower for some families moving to California from these states than the benefits the families would have been eligible for in their former state. For example, a family of three living in Stamford, Connecticut, can receive a maximum benefit of $636 a month in welfare benefits, but the benefit levels shown in the DSS table is $581. If a family moves to California from Stamford, it would receive $55 per month less than it would receive in Connecticut.

21. A review of the DSS table shows that it includes other mistakes in identifying the benefit levels in other states. The maximum benefit level for a family of three in Connecticut in the table is $581. This is not the maximum benefit for any family of three in Connecticut. Prior to July 1, 1995, the maximum welfare benefit for a family of three in Hartford, Connecticut was $581 a month, but that benefit level was reduced to $543 more than a year and a half before the distribution of the DSS table. In addition, the maximum benefit level identified for a family of three in New York in the DSS table is $524 a month, which also appears to be a mistake. The maximum benefit level for a family of three in New York City is $577 a month, and $53 of this is considered energy assistance. The table appears to show the benefit without the energy assistance portion. These examples highlight the difficulty of monitoring and keeping track of changes in welfare benefit levels in other states. These difficulties – and mistakes – arose even before the changes that are likely to result from the new welfare law have occurred.

22. The difficulties in collecting accurate information about other states' programs will be even more formidable for a recipient of assistance who wishes to contest a decision made by the state on the basis of the Relocation Family Grant. A family that is not provided the correct level of assistance will have a right to appeal that decision. That right, however, will be meaningless without accurate information. A low-income individual will have few means of accessing reliable information about the maximum benefits in the area of a state where she used to live or in some other area of the state with a higher benefit, under rules that may well have been rewritten a number of times since she moved to California.

California's Housing Costs Are Among the Highest in the Nation; Under the Residency Requirement, Many Families Moving to California Will Face Difficulty Finding Affordable and Decent Housing

23. While California's welfare benefit levels have ranked among the highest in the nation in recent years, a simple comparison of benefit levels is incomplete and somewhat misleading because it does not take into account differences in the cost of living across the states. The cost of living in California is among the highest in the nation. This can be demonstrated by examining differences in housing costs, typically the largest budget expense for welfare families. This means that California needs to provide higher benefits than states with lower housing costs in order to allow families to obtain a given quality of housing.

24. When 1996 welfare benefits are compared with housing costs, California's benefits rank near the middle of all states, Table I compares the maximum AFDC benefit for a family of three as of July 1996 with the costs of modest housing in each of the 50 states and the District of Columbia based on a survey conducted by the United States Congressional Research Service.

25. The housing measure used is the weighted average Fair Market Rent for metropolitan areas in each state. Fair Market Rents are established by the U.S. Department of Housing and Urban Development for every metropolitan area and non-metropolitan county in the U.S. They are the standard for several of HUD's principal low-income housing programs and are intended to reflect the amount needed to meet rent and utility costs of "privately owned, decent, safe, and sanitary housing of a modest (non-luxury) nature with suitable amenities." Federal Register, Vol. 61, No. 184 (September 20, 1996), p. 49576. The 1997 Fair Market Rents are based on 1990 census data that were updated each year based on data from the American Housing Survey of the Bureau of the Census (the primary source of housing data between decennial censuses), data collected from HUD telephone surveys, and the Consumer Price Index (the official measure of inflation in the United States).

26. As Table I indicates, the Fair Market Rent for even a one-bedroom exceeds the entire AFDC grant in nearly every state, and it would consume at least 61 percent of the maximum welfare benefit in every state. Thus, it is likely that most welfare families pay less for rent and utilities than the Fair Market Rent. Nevertheless,

because Fair Market Rents are determined using a consistent measure for every jurisdiction in the nation, and because they are intended to reflect the costs of decent low-cost housing, they are the best source with which to identify variations in the adequacy of welfare benefits relative to the costs of obtaining decent housing.

27. While California has higher welfare benefits than in most states, it also has higher housing costs than all but three states – Hawaii, New Jersey, and New York – and the District of Columbia. As a result, California's benefits are not necessarily more generous than states with lower welfare benefits when each state's housing costs are considered. For example, California's maximum welfare benefit for a family of three – $565 a month – is more than $100 higher than the monthly welfare benefit of $438 for a Montana family of three. Yet Montana's welfare benefits appear to be more adequate relative to housing costs than California's. The Fair Market Rent for a one bedroom apartment in Montana is $352, well below the average Fair Market Rent of $619 for one-bedroom apartments in California. Obtaining an apartment at the Fair Market Rent would require 110 percent of the maximum welfare benefit in California, but 80 percent of the maximum welfare benefit in Montana. This suggests that Montana's lower welfare benefits allow families in that state to occupy better quality housing than families in California that receive higher welfare benefits.

28. When welfare benefits are compared to housing costs in each state, California ranks 18th in the nation. In this light, the value of California's welfare benefits are close to the middle when compared with other states, not

near the top. Moreover, this ranking overstates California's standing because it does not take into account the limited extent to which welfare families in California receive housing assistance from the federal, state, or local government. According to the U.S. Department of Health and Human Services data for 1995, only nine percent of California's AFDC families received housing assistance. This was the lowest proportion of any state and less than half the national average of 22.5 percent. U.S. Department of Health and Human Services, Aid to Families with Dependent Children, Characteristics and Financial Circumstances of AFDC Recipients, FY 1995, Table 4.

29. Because California's housing costs are high relative to most states and because welfare families in California are less likely than welfare families in any other states to live in subsidized housing, the residency requirement will place many recently arrived welfare families on an inferior footing relative to welfare families in the state from which the newcomers moved. In all but two of the 45 states (including the District of Columbia as a state) in which welfare benefits are lower than in California, the average statewide costs of modest housing also are lower than in California. This means that newly entered residents from 43 of these 45 states typically will face higher costs of living, but they will not receive welfare benefits that reflect or adjust for those higher costs. As noted, the average Fair Market Rent for a one-bedroom apartment in Montana is $352 in 1997. A family moving from Montana to California – where the average Fair Market Rent is $619 a month – is likely to experience a sharp increase in housing costs. Under the California residency requirement, the family's welfare benefit would

remain at the Montana level of $438, rather than the California benefit of $565. As a result, such a family likely would have to spend a much larger share of its income to obtain housing in California than it had in Montana. It also is likely that the family would be more likely to live in overcrowded or substandard housing than it had in Montana.

30. The residency requirement also will leave recent residents of California on an inferior footing relative to long-term California residents, many of whom have difficulty affording decent housing despite receiving the state's regular welfare benefits. The average metropolitan Fair Market Rent for a two-bedroom apartment in California is $777 in 1997. Thus, the maximum welfare benefit for a family of three in California's urban areas, which is $565 a month, equals just 73 percent of the costs of obtaining a modest two-bedroom apartment. The maximum benefit for a family of three also falls below the average Fair Market Rent for a one-bedroom apartment, which is $620 a month. New residents, with even lower grants than other Californians, will face even more severe difficulties affording housing. In fact, there are 15 states in which the maximum AFDC benefit for a family three [sic] was less than half the Fair Market Rent for even a one-bedroom apartment in California.

31. There is evidence that the high costs of living in California have made it difficult for current welfare families to obtain basic necessities. Research conducted by Jane Mauldon of the Graduate School of Public Policy at the University of California-Berkeley included a telephone survey of California adults who were receiving AFDC benefits in October 1992. As part of the interview,

respondents were asked whether anyone in the family had gone without food at any time in the previous 12 months due to a lack of money to buy food. The interview also included questions needed to determine whether a family was living in overcrowded conditions – defined in the study as more than two persons per bedroom. The survey covered families in California counties that included 60 percent of all welfare recipients in the state. The survey results included responses from 1,705 welfare family heads, a sample size that is sufficiently large that the findings are likely to be representative of the general population in these counties. The study found that 36 percent of respondents had experienced hunger due to a lack of money in the prior year and that 35 percent lived in overcrowded conditions. Overall, 58 percent of families experienced one or both of these problems. Jane Mauldon, "Predicting Hunger and Overcrowding: How Much Difference Does Income Make?" Institute for Research on Poverty, University of Wisconsin-Madison, Discussion Paper 1114-96. It is likely that both of these problems are related to the high costs of housing in California, which make it difficult for families to obtain adequate housing and leave families with little money for food after paying the rent. (While the families that receive welfare typically receive food stamp benefits as well, the maximum food stamp benefit is lower than what most families need to get an adequate diet.) It is important to note that the maximum welfare benefit for a family of three in California today – $565 a month – is lower than the maximum benefit of $624 a month in 1992, which

suggests that the proportion of California welfare families unable to obtain adequate basic necessities has increased since the time this survey was conducted.

32. The difficulties in obtaining basic necessities would be even more severe for newcomers affected by the residency requirement than for long-term California residents. For example, a family of three moving to California from Texas would receive the maximum Texas welfare benefit of $188 per month. That amount is just one-third of the maximum benefit level for longer-term California residents. The family would receive a higher food stamp benefit than would be received by longer-term California residents – since food stamp benefits are based on a family's income. Nevertheless, the combined value of welfare and food stamp benefits for a family of three moving from Texas, $503, would be roughly three-fifths of the amount in food stamp and welfare benefits received by longer-term California residents, $840. Considering that a majority of California families that were eligible for the maximum California benefit experienced hunger or lived in overcrowded conditions in 1992, it seems likely that most families moving from Texas would suffer from one or both of these problems. The much lower cash grants would push more families into overcrowded quarters. Many families would likely find themselves compelled to move into housing that is substandard or is located in areas that are dangerous and unfit for children. Some families probably would become homeless. And most families that remain housed would have little or no money after paying the rent to supplement food purchased with food stamps.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND ACCURATE.

Date: 3/28/97

/s/ Robert Greenstein
ROBERT GREENSTEIN

Table I
HUD Fair Market Rents as Percent of Maximum AFDC Benefits, By State
States Ranked by Two-Bedroom FMR as a Percent of AFDC

Rank	State	HUD 1997 Fair Market Rents* 1 Bedr.	2 Bedr.	AFDC Benefit 3-Person Family July 1996**	One-Bedroom FMR As Percent of AFDC Benefit	Two-Bedroom FMR As Percent of AFDC Benefit	Percent of AFDC Families With Housing Aid, 1995
48	Alabama	$371	$443	$164	226%	270%	33.4%
1	Alaska	$565	$750	$923	61%	81%	34.0%
30	Arizona	$449	$557	$347	129%	161%	16.4%
45	Arkansas	$370	$468	$204	181%	229%	33.6%
18	California	$619	$777	$565	110%	138%	9.3%
32	Colorado	$454	$597	$356	128%	168%	31.5%
21	Connecticut	$613	$761	$543	113%	140%	34.1%
44	D.C.	$676	$794	$379	178%	209%	41.9%
39	Delaware	$544	$631	$338	161%	187%	37.0%
43	Florida	$508	$624	$303	168%	206%	15.8%
42	Georgia	$490	$576	$280	175%	206%	25.7%
19	Hawaii	$834	$982	$712	117%	138%	27.5%
29	Idaho	$411	$503	$317	130%	159%	32.1%
35	Illinois	$564	$679	$377	150%	180%	21.4%
33	Indiana	$412	$512	$288	143%	178%	22.7%
10	Iowa	$403	$505	$426	95%	118%	28.0%
6	Kansas	$394	$499	$429	92%	116%	19.3%
37	Kentucky	$383	$476	$262	146%	182%	28.1%
49	Louisiana	$415	$519	$190	218%	273%	28.5%
22	Maine	$455	$590	$418	109%	141%	31.3%
36	Maryland	$561	$672	$373	150%	180%	29.4%
16	Massachussetts	$612	$765	$565	108%	135%	43.2%
12	Michigan	$452	$555	$459	98%	121%	11.2%
5	Minnesota	$470	$599	$532	88%	113%	38.2%
51	Mississippi	$385	$459	$120	321%	383%	23.0%
28	Missouri	$347	$439	$292	119%	150%	26.8%
3	Montana	$352	$469	$438	80%	107%	43.7%
17	Nebraska	$390	$499	$364	107%	137%	38.0%
38	Nevada	$530	$644	$348	152%	185%	21.6%
15	New Hampshire	$571	$718	$550	104%	131%	21.5%
40	New Jersey	$666	$806	$424	157%	190%	20.7%
25	New Mexico	$449	$558	$389	116%	143%	28.9%
20	New York	$687	$796	$577	119%	138%	32.4%
41	North Carolina	$444	$520	$272	163%	191%	25.3%
7	North Dakota	$398	$504	$431	92%	117%	55.9%
26	Ohio	$390	$496	$341	114%	145%	28.8%
27	Oklahoma	$348	$453	$307	113%	148%	34.3%
14	Oregon	$472	$593	$460	103%	129%	19.5%
24	Pennsylvania	$469	$575	$403	116%	143%	19.4%
8	Rhode Island	$539	$648	$554	97%	117%	31.0%
46	South Carolina	$330	$490	$200	165%	245%	28.8%
13	South Dakota	$421	$543	$430	98%	126%	39.9%
47	Tennessee	$405	$495	$185	219%	267%	29.5%
50	Texas	$433	$556	$188	230%	296%	21.2%
11	Utah	$404	$511	$426	95%	120%	27.8%
2	Vermont	$482	$642	$633	76%	101%	22.7%
34	Virginia	$535	$633	$354	151%	179%	30.2%
9	Washington	$505	$640	$546	93%	117%	23.0%
31	West Virginia	$344	$424	$253	136%	167%	24.4%
4	Wisconsin	$443	$554	$517	86%	107%	17.5%
23	Wyoming	$389	$511	$360	108%	142%	23.7%
	U.S. (median)	$449	$557	$377	117%	145%	28.1%

* FMRs are averages of metropolitan FMRs in each state weighted by the number of renter households in each area.

** In states with benefits that vary by region, this reflects benefit in region with largest share of the state's welfare recipients.

BEST AVAILABLE COPY

Declaration Of Mary Ann Dutton

State of Maryland)
) ss:.
County of Montgomery)

MARY ANN DUTTON, Ph.D., being duly sworn, deposes and says as follows:

1. I am a clinical and forensic psychologist with a speciality in interpersonal violence, including domestic violence. My work involves research, clinical and forensic practice, teaching, and consultation. My curriculum vita is attached hereto. I make this affidavit in support of plaintiffs in the above-captioned case.

2. I hold a Ph.D. in Clinical Psychology from the University of Utah. My academic appointments currently include Director of Research, Program and Staff Development of the Institute of Post-Abuse Studies and Treatment, Inc., the Psychiatric Institute of Washington, located in Washington, D.C.; Research Professor, George Washington University Medical School; and Professorial Lecturer, National Law Center, The George Washington University. In addition I maintain a private psychotherapy practice and frequently provide forensic consultation to attorneys on violence related issues in the courts.

3. I have had significant experience with low-income women who have experienced domestic violence. In my current capacities as well as in prior clinical, research, and forensic positions, I have had frequent contact – both direct and indirect – with low-income clients. Indeed, many of the clients at George Washington University's domestic violence clinic are indigent, as are

many of my forensic clients. Because the largest proportion of abusers of heterosexual domestic violence are men and victims are women, I will refer to abusers as "he" and victims as "she"; this is not meant to deny that there can be and are some instances of women as batterers and men as victims.

The Dynamics of Domestic Violence

4. Domestic violence is based on a dynamic of power and control between the abuser and the abused. The abuser attempts to control, through physical violence and psychological abuse, the behavior of the victim or victims. Because of this dynamic, combined with other factors, it is often very difficult for a victim of abuse to leave her batterer. The batterer may control her access to financial support, forcing her, if she considers leaving, to choose between homelessness and further abuse. The batterer may have undermined the victim's self confidence, making it even more difficult for her to live independently. For some women, traumatic reactions to the violence may affect their ability to function effectively and to "get back on their feet" once having left. Further, the batterer may have threatened harm to the victim and her children if the victim attempts to leave the batterer. Remaining in the violent relationship, the victim faces the continued risk of violence, both to herself and her children. Fleeing the relationship is so important means of attempting to eliminate the opportunities for further abuse.

5. Thus, despite the psychological and physical impediments, fleeing an abusive relationship is a common and necessary tactic for avoiding further abuse. Two major factors contribute to the need for flight: (1) safety, and (2) support. Both factors may contribute to victims' need to flee considerable distances – and perhaps relocate to another state – in order to avoid further abuse of herself or her children.

Fleeing for Safety

6. Safety is an important factor in women's flight from abuse. In fleeing for safety, victims seek to remove the physical access necessary to maintain violence. These victims attempt to create distance or space between themselves and the abuser. They may need to relocate to another community or state, to a place where neither the batterer nor others aligned with the batterer can find them. In addition to increasing their safety, putting significant physical distance between themselves and an abuser may facilitate their efforts to break their emotional and psychological ties to the batterer.

7. Relocating to another community or state may also be necessary to protect children. There is significant overlap between domestic violence and child abuse; approximately 50 percent of severe batterers are also severely abusing the children in the home. In addition, children are at physical and psychological risk from witnessing violence in the home. Given this, an awareness of the children's safety is critical. For example, even though the victim and children have moved out the house, the abuser may still know where the children are in school

and may use that knowledge to threaten or harass them, to gain access to their mother, to take them, or even to perpetuate physical and sexual abuse.

8. Women's ability to flee – and to flee great distances – is also critical because the point at which a women leaves may be particularly dangerous. Of those women who have been killed by their batterers, most were killed at the time of or after separation. Separation is a significant risk factor for violence in general, and for lethal violence in particular. Putting significant distance between the victim and the batterer is a common sense way for her to attempt to deal with this dangerous dynamic and to increase her (and her children's) safety post-separation.

Fleeing for Support

9. Women may also need to flee great distances to seek support when separating from a batterer. Social, emotional and psychological support are important factors in helping victims recover from the trauma of abuse. This support may only be available from family and friends located in another community or state.

10. Further, the support of family and friends may be necessary as a domestic violence victim struggles to gain economic independence. Patterns of abuse often involve control of the victim's resources. After leaving her batterer, a women may need a safe place to live until she is able to establish a new home. She may need to rely on her family for childcare while she seeks employment or attends school. To get this necessary assistance, the

victim may need to relocate to be near the family and friends who can provide the support.

The Impact of Durational Residency Requirements

11. By limiting the options available to women who are victims of domestic violence, the durational residency requirement in California Welfare & Institutions Code § 11450.03 will affect women's ability both to flee violence and to maintain their separation from the batterer.

12. As an initial matter, a women may be deterred from leaving an abusive relationship that provides economic support if she realizes that, once in California, her welfare benefit level will be significantly below that available to longer-term residents and significantly below the levels generally deemed necessary to maintain a household at a minimal, subsistence level. If, as is often the case, the victim's family and friends are not able to provide adequate economic support, she may see no choice other than to stay with the batterer.

13. Further, the differential treatment of new residents and the low level of benefits available to many new residents, depending on their state of origin, may foster a women's pattern of returning to her batterer. If she is struggling financially and cannot manage, and particularly if she cannot provide for her children, the victim may be encouraged to return to her abuser. This pattern can be fatal.

14. Indeed, the durational residency requirement may have the effect of colluding with the abuser's efforts to maintain power and control over his victim. Often,

abusers will stress that the victim "can't leave" and "has no place to go." By denying new residents adequate welfare support, the durational residency requirement reinforces this message and provides another tool for a batterer to use in keeping the woman in the house and under his control.

Conclusion

15. There are many economic, social, and psychological factors that serve to perpetuate abusive relationships. For poor women seeking to flee these relationships, the options are already limited. The durational residency requirement further limits poor women's options by impeding their efforts to flee for reasons of safety and support. From a domestic violence perspective, this requirement may perpetuate violence and abuse, perhaps with fatal results for women who are forced to return to an abuser.

/s/ Mary Ann Dutton
Mary Ann Dutton, Ph.D.

Sworn to before me this
31st day of March, 1997

/s/ Linda Lee Fick
Notary Public

Linda Lee Fick Notary Public
State of Maryland
My Commission Expires
September 12, 1997

[Curriculum Vitae Omitted]

Declaration Of Brenda Roe

I, Brenda Roe declare and say:

1. The matters in this declaration are within my personal knowledge and if called upon as a witness I could competently testify thereto.

2. I have lived in Muskogee, Oklahoma for most of my life, although I was born in Orange, California. I am married to Mike Roe and I am currently pregnant. I will be six months pregnant by April 8, 1997.

3. My husband and I lived in Muskogee in a shared apartment with another couple in order to save on expenses. We paid $150.00 per month for our share of the apartment. My husband was working at a steel mill. After living with this couple, they began drinking and having loud parties. We don't drink, so we were forced to move out after they refused to stop their drinking and having loud parties. All of our belongings were destroyed by this other couple and we were forced to live at a motel, paying $95.00 a month. Soon after moving into the motel, Mike lost his job at the steel mill.

4. About one month ago, we decided to move to California so that Mike could find a job, since we had heard that there were more job opportunities in California, especially in construction. Mike had been unable to find a job in Muskogee. We bought bus tickets to Needles, California, which was all we could afford at the time. Our coming to California had nothing to do with TANF grant levels. I don't even know about this type of aid because I have never been on welfare.

5. When we arrived in Needles, we sought help at a local shelter where we were given motel vouchers. Shortly after our arrival, I developed a bladder infection and went to the local community hospital for medical treatment. I was placed on medication, but the following day, I became very sick and had to be taken to the hospital very late in the evening. I became delusional and had a low fever. I have had a prior miscarriage, so my husband and I became very concerned for the well being of our baby. I stayed at the hospital for two days. Since I have had a prior miscarriage, the doctors have told me that I need to be constantly accompanied by someone in case I have to be taken to the hospital.

6. My husband and I went to social services and applied for temporary aid to needy families (TANF), but we were told that we did not qualify because I was not yet six months pregnant, we would only qualify for general relief until the sixth month of pregnancy. I explained my medical condition to the case worker and was told that due to my pregnancy and my medical condition, it would be better if I were in another county that was more able to deal with my medical situation, given that the closest neonatal intensive care unit was in Loma Linda Hospital. The caseworker said she could give us two bus tickets and asked where we wanted to go. We didn't know of any place, but told her Long Beach since we heard there might be jobs out here.

7. We arrived in Long Beach on March 25, 1997 and went to look for a place to stay. We went to several shelters, but none of them would take us because of my pregnancy and my medical condition. We finally ended up at the New Image Emergency Shelter, where we were

given hotel and food vouchers. We applied for aid at the social services office on March 27, 1997, but were told that we would not be eligible for general relief until we had been in the county for 15 days. That will be on April 8th. By that date, I will also be six months pregnant and eligible for TANF. I have now found out that when I applied on April 8th, my husband and I will only be eligible for the Oklahoma grant level of $307.00

8. My husband and I have walked the streets of Long Beach looking at how much rents are and have found that the prices are $300.00 for a studio apartment. These places are very small and I don't know if they would take us with a baby on the way given the limited space. We have also looked at one bedroom apartments and they are much higher ranging from $450.00 to $650.00. There is no way we could make it on the grant level of $307.00. At this point we don't even have money for bus fare. All we have is 55 cents. $307 will not be enough to pay for the rent much less other necessities. My husband is unable to look for work at this time, because he has to stay with me for the time being. The doctor has stated that I cannot be left alone. This is the reason we are having problems finding a shelter that will house us. We will be homeless on Monday afternoon.

9. I do not want to use may real name because I am worried about the stigma that is attached to being on welfare. I am also fearful of what may happen upon the filing of this lawsuit.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed this 31st day of March 1997 at Long Beach, California.

/s/
Brenda Roe

Declaration Of Anna Doe

I, Anna Doe declare and say:

1. The matters in this declaration are within my personal knowledge and if called upon as a witness, I could competently testify thereto.

2. I was born in Baltimore Maryland, and have lived in and out of foster care most of my life. I came to California from Washington, D.C. I was placed in foster care when I was 11 years old and I lived with many families. I became an emancipated minor when I was 17 years old.

3. I most recently worked as a telemarketer selling computer supplies, but this position was very stressful and due to the fact that I am pregnant I had to resign for the health of my baby. I came to California seeking a better life for me and my baby. I believed that I could find a good job here in California so I came to look for employment. I have various skills ranging from typing to brick laying. I have worked as a receptionist, a painter, a brick layer, a typist and telemarketer. I came to California to look for work not to receive a higher grant payment.

4. When I initially arrived in California I lived with friends and I had my job, but the situation became financially difficult for them and me after I couldn't work any longer, so I sought help at a shelter. I have been at the shelter for a month. I have looked for employment in many places, but it is difficult to find a job when I am so far along in the pregnancy.

5. I am five months pregnant I am currently receiving general relief, but I will be eligible for Temporary

Assistance for Needy Families in April, 1997 when I will be six months pregnant.

6. I have looked at rents for apartments and they range from $450-570. I would not be able to make it on rent at that price if I were only to receive the $330 Washington, D.C. grant.

7. I do not want to use my real name because I am worried about the stigma that is attached to being on welfare. I am also fearful of what may happen upon the filing of this lawsuit.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 31st day of March, 1997 at Hollywood, California.

/s/
ANNA DOE

Declaration Of Joel F. Handler

I, JOEL F. HANDLER, declare:

1. I am Richard C. Maxwell Professor of Law at UCLA Law School and UCLA School of Public Policy and Social Research. My general background and credentials are set forth in my resume, a true and correct copy of which is attached. I have done extensive research, writing and study in the field of welfare and poverty from a legal, sociological and policy perspective. I have written or co-authored more than 10 books and numerous articles in that field.

2. Many of the concepts of the contemporary "welfare reform" debate characterized by political leaders as innovations, are in fact centuries old. For example, the differential treatment of the "deserving poor" – those unable to work due to disability – and the "undeserving" or "working" poor – those presumed able to work – dates back to medieval England. Welfare policy toward the latter group has for hundreds of years been influenced by the doctrine of "less eligibility," which holds that life should be made so miserable for "undeserving" welfare recipients that they would rather work than accept public aid. Local community control of welfare policy for the "undeserving" poor is also a very old idea, because English and American governments have shown a marked historical tendency to delegate regulation of "moral" issues to local communities, and poverty has always been associated with immorality. Local communities, since pre-17th century England and the American colonial period, have shown a marked hostility toward migration of poor people, characterizing unemployed

migrants searching for work as vagrants, and enacting exclusionary policies, such as requiring newcomers to post a bond as a condition of settling.

3. The stigmatizing association between poverty and immoral lack of motivation to work is also timeless. Welfare policy has always been heavily influenced by the faulty assumption that work sufficient to provide for the necessaries of life is available for those who simply have the right attitude.

4. Current welfare policy is based on an assumed distinction between "welfare" and "work." (In this declaration, I use the term "welfare" to refer primarily to AFDC and its successor program.) Although "work" is still conceived of as a full-time, steady career employment at decent wages and with benefits, this is becoming increasingly untrue for significant portions of the labor force. Real earnings of the less skilled, less educated workers have declined substantially since 1973 despite economic expansion and aggregate growth in employment. From 1973 to 1989, median income (in 1989 dollars) for men with high school diplomas declined from $30,252 to $21,650; and for women, from $11,087 to $10,439. The decline in income was worse for those with one to three years of high school: for men, median income declined from $24,079 to $14,439; and median income for women with the same level of education declined from $7,920 to $6,752.

5. Not only is there a spread of low wage jobs, but the nature of employment is shifting from full-time work for a single employer to various forms of "contingent" work: temporary, contract of other types of flexible work

arrangements that lack job security. The General Accounting Office estimated that in 1988 there were 32 million contingent workers, almost a quarter of the work force. While contingent work is desirable to some, for many others it is a disguised form of unemployment. *Involuntary* part-time work increased 45 percent during the 1980-83 recession, and 13 percent overall during the 1980s. Part-time jobs are more likely to be dead end and of shorter duration than full-time jobs.

6. The prevailing myth about welfare is that AFDC recipients are primarily young black women who have lots of children, are long-term dependent, and pass this dependency on from generation to generation. Such generalizations are false. According to the 1994 Green Book (U.S. House of Representatives Committee on Ways and Means, *1994 Green Book: Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means*), only 37.2 percent of the AFDC population was African American. The average AFDC family is about the same size or slightly smaller than the average non-AFDC family. From 1969 to 1992, the average AFDC family size decreased from 4.0 to 2.9 persons; 72.7 percent of AFDC families consist of one or two children, and 90 percent of three or fewer children.

7. Finally, long-term welfare "dependency" is the exception rather than the rule. The myth of a predominance of long-term welfare "dependents" is perpetuated in part by the fact that most empirical studies of AFDC are based on annual data, which provides a somewhat misleading "snapshot" that overstates the proportion of welfare recipients who are long-term. The following example from the 1992 Green Book points out why:

> Consider a 13-bed hospital in which 12 beds are occupied for an entire year by 12 chronically ill patients, while the other bed is used by 52 patients, each of whom stays exactly 1 week. On any given day, a hospital census would find that about 85 percent of the patients ($^{12}/_{13}$) were in the midst of long spells of hospitalization. Nevertheless, viewed over the course of a year, short-term use clearly dominates: out of 64 patients using hospital services, about 80 percent ($^{52}/_{64}$) spent only 1 week in the hospital.

Yet even the annual data, which will overstate the proportion of long-term AFDC recipients, shows that half have been on welfare (though not necessarily continuously) for two years or less, and nearly two-thirds are on welfare four years or less. Moreover, research of monthly data shows a very dynamic welfare population, with recipients going on and off welfare numerous times within these time frames. Half the recipients exit AFDC within the first year and about three quarters within two years. The overall picture is that one group consists of people who receive welfare for short periods of time and never return; a middle group cycles on and off, some for short periods and others for longer periods of no more than five years; and a third group, which stays on continuously for longer periods, but amounts to no more than 15 percent of the total AFDC population.

8. These facts are inconsistent with the view that welfare benefits provide a significant "incentive" for people to move to high benefit states. Rather, the evidence of recipients leaving AFDC or cycling on and off AFDC tends more strongly to show that AFDC recipients are motivated to seek work. In fact, empirical studies confirm

that, against considerable odds, the majority of welfare recipients work while they are on welfare, trying over and over to find and keep jobs, and eventually leave welfare through work. AFDC recipients treat welfare not as an incentive, but rather as a form of unemployment insurance; the majority relies on welfare simply because they cannot find jobs that pay enough to support their families.

9. Analogous to the "welfare magnet" theory is the false perception that AFDC mothers choose to have children in order to capitalize on increased AFDC benefits. Yet there is no evidence for that perception. Again, AFDC families are the same size or slightly smaller than non-AFDC families on average. If AFDC benefits encouraged having children, we would expect to see larger family size and higher teen birth rates in high benefit states, but that is not the case. AFDC mothers are *less* likely than non-AFDC mothers to have multiple pregnancies and *more* likely to use contraception.

10. An important study (Levine and Zimmerman, 1996) of the alleged "welfare magnet" hypothesis found a distinct absence of empirical support for the proposition that AFDC recipients tend to move from lower to higher benefit states, or to remain in higher benefit states. The study analyzed annual demographic data from the National Longitudinal Study of Youth, which has collected close to 19,000 data observations on 14 to 21 year-olds each year from 1979 to 1992. The study found that only 3.8 percent of the AFDC-eligible population moved from one state to another, and only 1.8 percent moved from a state offering lower to a state offer higher AFDC benefits. In contrast, out of AFDC non-eligible people, 6.8

percent moved to a different state, 3.4 percent from a lower to a higher benefit state. Isolating the percentages of people who moved from one state to another, non-AFDC-eligible people were more likely to move to higher benefit states than AFDC-eligible people percentages of people who moved from one state to another, non-AFDC-eligible people were more likely to move to higher benefit states than AFDC-eligible people (50% of *those who moved* compared to 42%) – exactly the opposite of the correlation that would be predicted by a "welfare magnet" effect. It is also noteworthy that less than half of the AFDC-eligible population that moved to a higher-benefit state actually went on welfare within the first two years of their move.

11. It is my opinion, based on many years of research in the field and reviewing numerous studies on the subject that the "welfare magnet" hypothesis is myth rather than reality. The available evidence supports the contrary view, that poor people move to find work or for a variety of other reasons unrelated to the size of welfare benefits. Although it is often expounded with the vocabulary of modern economics, or with popular political terminology like "personal responsibility," the view that welfare benefits motivate such important life decisions as whether or where to find work, or whether to have a child, is founded far more on the prejudice that poverty is caused by an immoral lack of desire to work than on real behavioral evidence. Accordingly, the welfare magnet theory is a form of invidious discrimination against the poor.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 25th day of April, 1997, at Los Angeles, California.

/s/ Joel F. Handler
JOEL F. HANDLER

[Curriculum Vitae Omitted]

Declaration Of John Hartman

I, John Hartman, hereby declares as follows:

1. I am an Assistant Professor of Sociology at Columbia University and have a specialization in social science statistics.

2. I have been involved in the collection and analysis of social welfare data for the last ten years. Between 1985 and 1989 I worked with Russell L. Hanson of Indiana University on a Foundation project concerned with the expansion and contraction of social welfare spending at the state-level in the United States. From 1992 to the present I have been engaged in research on the interstate migration patterns of the indigent.

3. I am familiar with the recent changes in California's welfare program, particularly the new multi-tier durational residency requirement for Temporary Assistance to Needy Families (TANF) that limits the amount of benefits available to new California residents for the first 12 months of their residency in California to the level of benefits available to them in their previous state of residence.

4. While there is relatively little literature on the migration of the indigent to receive additional general assistance benefits, there is a substantial literature in economics and sociology concerning migration and Aid to Families with Dependent Children (AFDC) benefits. Given that benefit levels are argued by state policymakers to determine the migration patterns for both groups of poor people (and thus similar processes are at

work in both cases), I will locate the general assistance arguments within the AFDC framework.

5. Although they are not new, policymakers' concerns about the magnetic draw of welfare benefits have intensified recently. Two developments may explain this. Residency requirements were declared unconstitutional in 1969 by the U.S. Supreme Court, depriving states and localities of their favorite means of excluding poor migrants from the welfare rolls. About the same time, economic changes spurred substantial movement toward the Sunbelt. Large numbers of people, some of them poor, left their home states in search of jobs and other amenities in the South and West. As a result of this movement, one-third of the nation's population now lives outside of the state or county in which they were born, according to the Bureau of the Census.[1] Given this shift in population, it is not surprising that state officials worry about attracting too many poor people and seek ways of repelling them.

6. To justify exclusionary measures, state and local policymakers have tried to document the effect of massive internal migration on welfare rolls. Wisconsin provides a good example of how this may be done. The state recently commissioned a study by James Wahner and Jerome Stepaniak, who examined 74,763 AFDC cases opened between September, 1985 and August, 1988.[2]

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[1] Bureau of the Census, 1992. *1990 Census of Population and Housing: Summary Social, Economic, and Housing Characteristics*, United States. Washington, D.C: U.S. Department of Commerce, 1990 CHP-5-1.

[2] Corbett, Thomas. 1991. "The Wisconsin welfare magnet debate: What is an ordinary member of the tribe to do when the witch doctors disagree?" *Focus* 13,3: 19-28.

They discovered that twenty-nine percent of the new cases involved families headed by non-natives, i.e. individuals who were not lifelong residents of Wisconsin. Similar studies in other states discover the same thing: a substantial portion of welfare recipients are migrants whose behavior ostensibly reveals a preference for generous welfare benefits.[3]

7. Studies of the residential origin of AFDC recipients make good political headlines, but they are not very scientific. Policymakers would undoubtedly discover that a substantial percentage of state driver's licenses are held by non-natives, if they ordered a study of licensee's backgrounds. This is surely not because people are attracted to states with easy examinations and road tests. Rather, it is an incidental effect of interstate migration, and it is not the only one. Precisely because migration is so common, non-natives are bound to represent a significant fraction of those who are affected by state policies of any kind, not just welfare.[4] Only if non-natives are disproportionately poor is there any reason to think that benefits actually induce migration.

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[3] Many state benefit levels are woefully inadequate. Compared to them, states that make higher payments are "generous." My use of the terms is relative.

[4] For that matter, non-natives will comprise a significant fraction of those who pay taxes in a state, taxes that help finance goods and services used more heavily by natives. However, governors do not seem inclined to offer rebates to newcomers, except perhaps as part of a package to woo business investors (See Russell L. Hanson, 1993, "Bidding for Business: A Second War Between the States?" *Economic Development Quarterly* 7,2:183-198.)

8. With regard to the purported magnetic effects of welfare, then, the relevant question is not "What proportion of AFDC recipients are migrants?", but rather, "What proportion of migrants become AFDC recipients?" Even more precisely, the question is "What proportion of migrants relocated in order to obtain better benefits than were available in their previous state of residence?" – a formulation that highlights the importance of people's motives for moving from one state to another. Such motives vary; they include the desire to be near family and friends, to have better job opportunities, or to live in a cleaner, safer environment, etc. The motives may also include the availability of better welfare benefits, as politicians claim, though the evidence in support of this claim is surprisingly thin, as we shall see.

9. A related question involves the retentive power of welfare benefits. High benefits may hold the poor in place, deterring migration to states with better economic conditions or other attractions. Indeed, Peterson and Rom[5] suggest that the number of poor immigrants drawn to states with high benefits may be substantially less than the number of poor who refuse to leave such states even after employment prospects deteriorate and wages stagnate or decline. Perhaps this is because the poor want to reside in states with liberal benefits, just in case they need assistance at some future date. However, the clear implication of Peterson and Rom's claim is that poor people in liberal states actually receive welfare benefits, and these

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[5] Peterson, Paul E. and Mark Rom. 1990. *Welfare Magnets: A new Case for National Standards*. Washington, D.C.: The Brookings Institution. (See page 20).

benefits overcome the attraction of other states' economic, social, or political opportunities.

10. Here again the question of motivation comes to the fore. Do poor individuals choose to remain in place because they have access to good welfare benefits? Or do they decide against moving out of a desire to remain close to family, friends, or labor markets that are depressed, but nevertheless familiar and hence easier to negotiate? Subsequent receipt of welfare benefits would then be incidental to people's choice of residence; having decided to stay, and finding themselves in need, poor people avail themselves of public assistance, though that may not be why they decided to stay in the first place.

11. Obviously, an accurate assessment of the magnetic effects of generous welfare benefits depends on knowing why some poor people stay put, while others move across state lines. Unfortunately, there are no systematic studies of the residential choices of the indigent population; all we have are the "revealed preferences" of poor people, as expressed in their geographic settlement patterns. These revealed preferences cannot confirm the hypothesized effects of welfare benefits, since they do not tell us why people chose to live where they do. Even if we observe behavior that is consistent with the alleged effects, we cannot be certain that high welfare benefits were the primary reason why poor people moved to high benefit states, and stayed there.

12. On the other hand, revealed preferences can be helpful in disconfirming the welfare magnet hypothesis. If poor people do not move to states with high benefits, or if they move to such states but do not apply for

assistance, the attractive power of high benefits cannot be very strong, suspicions of state policymakers to the contrary notwithstanding. Similarly, if poor people who continue to reside in high benefit states show no great inclination to draw benefits, then it is hard to see how they are being held in place by the retentive power of welfare magnets. Hence, we can at least use information about settlement patterns to examine the plausibility of the welfare magnet hypothesis.

13. Recently there have been seven large-scale attempts to measure the magnetic effect of welfare benefits.[6] The best-known, and least satisfactory, study is that by Peterson and Rom, who examined the effect of welfare benefit levels on changes in state poverty rates, and vice-versa.[7] Using aggregate data, Peterson and Rom found that states with high benefits experienced unusually large increases in poverty from 1970-1975, 1975-1980, and 1980-1985. The increases in poverty rates could not be explained by increases in unemployment or declines in

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[6] Larry Long provides a good review of early research on this problem. See Long, "Poverty Status and Receipt of Welfare Among Migrants and Nonmigrants in Large Cites." *American Sociological Review* 39: 1: 46-56. Cebula's provides a fairly comprehensive and useful update in his test, *The Determinants of Human Migration*. Lexington, MA: D.C. Heath and Company. A summary of recent findings can be found in Nathan Glazer, 1987, *Migration and Welfare*, prepared for U.S. Department of Health and Human Services, as part of contract number HHS-100-86-0021 (David Ellwood and Robert Lerman, principal investigators).

[7] Peterson, Paul E. and Mark Rom. 1990. Welfare Magnets: *A New Case for National Standards*. Washington, D.C.: The Brookings Institution.

wages and personal income. Hence Peterson and Rom concluded that changes in aggregate poverty rates must have been at least partially the result of individuals' decision to move to states with higher benefit levels, or remain there upon losing their jobs or other sources of income.

14. Peterson and Rom do not actually show that poor people migrate to high benefit states, let alone that migrants move in order to receive better benefits. Indeed, they cannot, given their reliance on aggregate data. Peterson and Rom resort to ecological inference to make their case: since the observed outcome is consistent with the migration of poor people in search of better benefits, it must have occurred because poor people are attracted to liberal states and remain there, once settled. The logical pitfalls of this approach are obvious. The same outcome could be the result of any number of decisionmaking processes, some of them not even involving the behavior of poor people. For example, poverty rates may have increased because middle and upper income groups left for better opportunities elsewhere, opportunities not available to their less fortunate brethren. The fact that different processes operating at the individual level can produce identical outcomes in the aggregate has generally led social scientists to avoid the sort of argument the [sic] Peterson and Rom advance.

15. Three recent studies of migration and welfare are better, insofar as they employ data about individuals and their behavior. Unfortunately, these studies suffer

from other problems. Rebecca Blank[8] tested the combined impact of welfare benefits and wages on migration between ten regions, using information from 2,459 respondents in the March, 1979, Current Population Survey. But she did not attempt to analyze the independent effect of welfare benefits on migration, nor did she examine migration patterns between states within the same region. Consequently, the findings of her study do not directly address the welfare magnet hypothesis.

16. A study by Gramlich and Laren used data from the Panel Study of Income Dynamics (PSID), and a subsample of the 1980 Census.[9] Gramlich and Laren examined the behavior of 1220 female-headed families on AFDC over a five-year interval of time. They concluded that "migration in response to AFDC benefit levels does seem to take place though very sluggishly".[10] Indeed, the process was so sluggish that it would take about forty-five years for half of their respondents to end up in high benefit states, starting from a situation in which all states paid equal benefits, and then introducing benefit differentials comparable to those observed in 1980.

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[8] Blank, Rebecca. 1985. "The Impact of State Economic Differentials on Household Welfare and Labor Force Behavior." *Journal of Public Economics* 28: 25-58.

[9] Gramlich, Edward M. and Deborah S. Laren. 1984. "Migration and Income Distribution Responsibilities." *Journal of Human Resources* 19: 489-511.

[10] See Edward M. Gramlich, Edward M. [sic] and Deborah S. Laren. 1984. "Migration and Income Distribution Responsibilities." *Journal of Human Resources* 19 at page 491.

17. Sophisticated though it is, the study by Gramlich and Laren has its faults. The PSID sample has severe problems of attrition. Those most likely to be lost at each wave of the panel are individuals who move out of state. Consequently, the PSID tends to lose data on precisely those people whose behavior is at the center of the dispute about welfare's magnetic effects. Supplementing the PSID sample with 1980 Census data is not a solution to this problem. In fact, use of the 1980 Census leads to the opposite problem, since it defines respondents' prior home as the state of residence in 1975.

18. Anyone who moved to a high benefit state in the in the intervening five years and was on AFDC in 1980 could have been lured by the expectation of generous assistance, according to this measure. Yet the magnetic effects of welfare surely operate in the short run, not over the long haul; a 1979 migrant might have been drawn by the prospect of good benefits in 1980, but not someone who moved in 1976, four years before 1980 benefits were set.[11]

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[11] This criticism would also hold for the Frey, Liew, Xie and Carlson (1995) study which located "very small" welfare magnet effects using data from the 1990 census. In addition, the Frey, et al study employed few controls for individual characteristics and, in fact, tested the welfare magnet hypothesis by using certain age groups (25-29, 30-34, etc) of the entire poverty population in 1990. Walker (1994) also uses census data to test this hypothesis, but limits his attention to adjacent counties as part of effort to control for migration costs. The above references are: Frey, William H., Kao-Lee Leaw, Yu Xie and Marcia J. Carlson. 1995. "Interstate Migration of the US Population: Immigration 'Pushes' and Welfare Magnet 'Pulls.' " Population Studies Center, Research Report no. 95-331. And:

19. The most promising study to date uses information gathered in the Study of Income and Program Participation, or SIPP. Rebecca Clark finds some evidence of low-income mothers' willingness to move to neighboring states in order to obtain better benefits, though these women apparently do not consider longer moves that would yield even higher benefits. As Clark (1992: 10) puts it, solo mothers on welfare "who live near a state with substantially higher payments than the state they live in are more likely to migrate than those whose states are relatively more generous." Otherwise, "the *level of welfare payments* in a state relative to all other states *does not significantly affect migration.*" (Both emphases are added.)

20. Unfortunately, the number of state-to-state movers in the SIPP data is small, which makes it difficult to test hypotheses about migration. About 15% of the typical SIPP panel move during a twelve month period. However, only 1.6% of the SIPP panel moves from one state to another in the course of a year, whereas about 3% of the Current Population Survey sample consists of state-to-state movers.[12] Thus, SIPP under samples the group of people whose behavior is most relevant to hypotheses about welfare's magnetism. Since the number of state-to-state movers is small to begin with, the under

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Walker, James R. 1994. "Migration among Low-Income Households: Helping the Witch Doctors Reach Consensus." Institute for Research on Poverty Discussion Paper no. 1031-94, University of Wisconsin at Madison.

[12] DeAre, Diana. 1990. "Longitudinal Migration Data from the Survey of Income and Program Participation." *Perspectives on Migration Analysis, Current Population Reports Special Studies Series* P-23, No. 166, pp. 13-23.

sampling of SIPP produces too few cases for reliable statistical analysis, particularly when serious problems of panel attrition are taken into account.

21. In am convinced that Current Population Surveys provide the best available source of information for a study of welfare's magnetic effects. These surveys contain information on respondents' current state of residence, previous state of residence, income, occupational history, AFDC benefits received, public assistance received, and employment status. The samples are very large, generally including about 56,500 households (or between 154,492 and 181,488 individuals), and separate samples are available for 1982, 1983, 1984, 1986, 1987, and 1988.[13] The large sample sizes include a substantial number of people who move from one state to another, and because it is known where these people live it is easy to add contextual information on employment, wages, welfare benefits and other possible motives for moving.

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[13] Current Population Surveys prior to 1982 did not report a person's prior state of residence, at least not in data that have been made available to the public. The 1985 survey used a five-year window of migration, like the Census, and I elected not to use it. Surveys after 1988 could be used to extend the analysis, but the analysis would have to contend with the far-reaching effects on AFDC of the 1988 Family Support Act. The FSA induced sweeping changes in some states' programs, which may have altered the putative impact of benefits on migration. Thus, I limited the analysis to the years between 1981, when the Omnibus Reconciliation Act established a new means test on gross income for AFDC, and 1989, when the Family Support Act went into effect. The two actions of Congress define a stable period of state programming.

22. Most importantly, the surveys include sizable numbers of those who are most likely to consider welfare benefits when deciding where to live: poor women of childbearing age. Under this definition, this group includes all women between the ages of fourteen and forty-five who live in households with a total income less than or equal to 125% of the poverty line.[14] This is the group from which AFDC recipients are potentially drawn, and AFDC is the central focus of the welfare magnet hypothesis and political controversy surrounding it.[15]

23. The CPS can be used to test the following proposition about the magnetic effects of welfare benefits: All else equal, poor women of childbearing age are likely to

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[14] I further limited the analysis by excluding poor women of childbearing age who live in Alaska and Hawaii, or who recently came to one of the forty-eight states from another country. For these women it is hard to see how the benefit differentials induce long-distance migration. I also excluded residents of the District of Columbia, concentrating on those people whose residential decisions might be subject to the action of state policymakers, whose place in hypotheses about the magnetic effects of welfare is essential.

[15] I include poor women who do not have children at the time of survey because they may be pregnant, at risk of becoming pregnant, or wanting to become pregnant. See Gregory Acs (1993) "The Impact of AFDC on Young Women's Childbearing Decisions." Institute for Research on Poverty Discussion Paper, for a discussion of the impact of benefit levels on family formation and size. Poor women without children are freer to move, and hence to respond to welfare benefit differentials. By including them, the sample gives the welfare magnet hypothesis every chance to succeed.

move from states that pay low benefits to states with higher AFDC payments.[16]

24. Information from 48,192 respondents was used in the analysis. Table 1 lists the number of respondents according to the year in which they were interviewed. It also indicates how many respondents moved from another state in the year preceding their interview. Obviously, interstate migration rarely occurs among poor women of childbearing age. In any given year about five percent of these women move across state lines, and the rate of migration seems to be slowing with the passage of time.

Table One

Poor Women of Childbearing Age,
CPS 1982-1984, 1986-1988

Year	Number	Non-migrant	Migrant	Rate of Migration
1982	8,146	7,721	425	.052
1983	8,670	8,220	450	.052
1984	8,712	8,212	407	.047
1986	7,658	7,283	365	.048
1987	7,620	7,275	345	.045
1988	7,396	7,068	328	.044
Pool	48,192	45,779	2,320	.048

Note: All figures in this table and the following analyses are unweighted.

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[16] For an extended discussion on this point, see Russell L. Hanson and John Hartman, 1994, "Do 'Welfare Magnets' Attract? The New Federalism and Migration During the 1980s," Institute for Research on Poverty, Discussion Paper #1028-94.

25. What distinguishes migrants from nonmigrants? In general, poor women migrants tend to be young, white, high school graduates with small families. They also have incomes near or slightly above the poverty threshold, providing the wherewithal for moving. These migrants do not fit the stereotypical image of a footloose underclass pursuing the most lucrative welfare benefits. They are the children and women next door, so to speak, not the "welfare queens" of political lore.

26. Poor women who are older, have large families, and earn little or no income are less likely to move. The number of children makes it harder for these women to disengage from a community, and a lack of education may dampen their awareness of opportunities elsewhere. Moreover, such women may not be able to afford an interstate move, given their dire financial straits: these women live in households with incomes well below the poverty line. The fact that nonmigrants come disproportionately from the ranks of minority women for whom congenial residential alternatives are limited further contributes to the inertia.

27. The low rates of migration reported in Table 1 suggest that welfare benefits have only a weak attraction for potential AFDC recipients. If poor women were aggressively seeking higher benefits, Table 1 would show much higher rates of migration than it does. By itself, this finding does not disprove the welfare magnet hypothesis, however, since low rates of migration can still produce large flows of population.

28. More damaging to the welfare magnet hypothesis is the fact that women who do migrate show no

preference for states with high benefits. The 2,320 migrant poor women in the pool of respondents were as likely to settle in states with low benefits as states with high benefits. This is evident in Table 2, which summarizes the results of an OLS regression analysis of the residential choices of 48,192 poor women of child rearing age.

Table Two

Migration Choices of Poor Women of Childbearing Age

Variable	Parameter Estimate	Standard Error	t Value	Pr t=0
Intercept	0.00201600	0.00006562	30.727	0.0001
Wage differential*	-0.00000036	0.00000048	-0.743	0.4577
Welfare benefit differential*	-0.00000006	0.00000033	-0.168	0.8663
Cost of Living differential	-0.00000080	0.00000005	-16.972	0.0001
Model Fit				
R-square	.021			
Adj. R-square	.021			
Root MSE	.004			
Number of State Pairs 13,633				

* Adjusted for cost of moving

29. The estimates presented in Table 2 are based on a simple "gravity model" of residential choice.[17] Gravity models assume that migration between one state and another is directly proportional to the size of the population of the sending state, and inversely proportional to the distance between the sending and receiving states. The model can be altered by adding other considerations, e.g. the level of welfare payments in receiving states, to see if they raise or lower the natural flow of population stipulated by the gravity model.

30. The above adaptation of the gravity model has a simple logic. In deciding where to live, a poor woman can choose to remain where she is, or move to one of forty-seven other states in the continental U.S.[18] Differences in welfare benefits enter into her calculation, according to the welfare magnet hypothesis: all else being equal, states with higher benefits will be more attractive than states with lower benefits. Indeed, the state with the highest benefit will be most attractive of all, and poor women will be drawn to it in large numbers unless countervailing considerations come into play.

31. The same will be true of wage differentials. Public assistance is one possible source of income; wages are another, and often better, means of support. Thus, poor women who base their choice of residence primarily on prospective income must take prevailing wage levels into

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[17] Cadwallader, Martin. 1992. *Migration and Residential Mobility: Macro and Micro Approaches*. Madison, WI: University of Wisconsin Press.

[18] Alaska and Hawaii are excluded from this analysis, as the costs of moving far exceed any potential gain in benefits.

account. This is true even for those inclined to trade income for leisure, as some economists put it. Such women may opt for welfare as their primary source of income, but for the majority of them "spells" on welfare are fairly short. Public assistance payments must therefore be replaced by income from another source, e.g. wages, at least until a return to welfare becomes possible. Thus, the prospect of earning higher wages ought to influence location decisions, just as the generosity of public assistance ostensibly does.

32. Income is not the only consideration, however. Often states with better wages and liberal AFDC benefits have higher costs of living, which reduces their attractiveness somewhat. Conversely, costs of living are often lower in states with low wages and niggardly benefits. Thus, the net improvement in living standards will be the deciding factor, after the costs of moving are taken into account. Such costs include separation from family and friends, as well as the financial expense of transporting family and personal belongings across state lines.[19]

33. The decisionmaking can be summarized in the following way:

$$[1.0]M_{ijt} = a_1 + b_1BENEFIT_{ijt} + b_2WAGE_{ijt} + b_3COL_{ijt}$$

where

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[19] Given the generally low benefits paid to AFDC recipients, interstate welfare benefit differentials will necessarily be small. The costs of moving can easily exceed benefit improvements even when the latter are tallied over the course of a year. Surprisingly few studies of welfare magnetism factor these costs into the equation.

M_{ijt} = the proportion of poor women of childbearing age who move from states i to j in the year preceding the CPS interview;

$BENEFIT_{ijt}$ = the difference in benefits available in states i and j at the time of interview, adjusted for moving costs;[20]

$WAGE_{ijt}$ = the difference in wages available in states i and j at the time of interview, adjusted for moving costs;[21]

COL_{ijt} = is the difference in cost of living for states i and j at the time of interview, as calculated by

[20] The nominal benefit is the maximum monthly payment to an AFDC family of three with no income, plus the value of Food Stamps such a family would receive. The data are from various editions of Background Material and Data on Programs within the Jurisdiction of the Committee on Ways and Means, a publication of the U.S. House of Representatives. The nominal benefit is divided by the logged value of the distance in miles between the major city in each state, on the notion that moving costs (social, psychological and monetary) are a function of distance. In the general population, around a third of all interstate moves are to a geographically contiguous state and therefore involve short distances. See Larry Sink (1992) "Trends in Internal Migration in the United States." In *Population Trends in the 1980s, Current Population Reports, Special Studies, Series P-23, No. 175*. Washington, DC: U.S. Department of Commerce, Bureau of the Census.

[21] The nominal value of WAGE is the average weekly wage in a state's manufacturing sector, as reported in various issues of Employment and Earnings, a publication of the U.S. Department of Labor. This is divided by the logged value of the distance between major cities, as described in the preceding note.

McMahon and Chang, using 1981 as the base year.[22]

i = state of residence in year prior to survey
j = state of residence at time of survey
t = year of survey (1982, 1983, 1984, 1986, 1987, 1988)

34. Model 2 is applied to a 48 x 48 table of states, in which current state of residence forms one dimension, and previous state of residence is the other. For women who do not move, the states are identical; i = j, and these cases are classified into the diagonal elements of the table. The off-diagonals report population flows from i to j, and from j to i, respectively. Each of these cells records the observed rate of migration by poor women from one state to another, calculated for the pooled sample of 48,192.

35. The table contains 2,304 cells in the table, but since we analyze six Current Population Surveys, there are a total 13,824 units of analysis (if we ignore missing data problems). For example, there are six cells containing a total of 4,804 respondents who live in California at the time of survey. twenty, or 0.6%, of them had recently moved from Texas, where welfare benefits were half the level of assistance in California, and wages were also substantially lower. Another six cells include 21 poor women who moved from California to Texas, where living costs were about fifteen percent lower. For the years in our sample, there were a total of 4,804 respondents in

[22] McMahon, Walter W. and Shao-Chung Chang. 1991. *Geographical Cost of Living Differences: Interstate and Intrastate, Update 1991*. Normal, IL: Center for the Study of Educational Finance, Illinois State University.

the California subsample, so the rate of immigration to Texas was about 0.4%. The net exchange in our sample was one person, a finding that is consistent with other studies tracking the flow of population into, and out of, California.

36. As Cebula notes, it is important to consider immigration and emigration separately when analyzing the impact of welfare benefit differentials on residential choice.[23] If the welfare magnet hypothesis is true, there should be an exodus from low benefit states to areas where benefits are higher, reflecting the attraction of high benefits. Movement out of high benefit states should be minimal, since the hypothesis also refers to the holding power of liberal welfare benefits, i.e. their depressing effect on emigration.

37. Table 2 shows no support for the welfare magnet hypothesis, however. The proportion of poor women of child bearing age who move from one state to another is unaffected by welfare benefit differentials, adjusted from moving costs. Such women are as likely to move to states with low benefits as they are to settle in states with high benefits. Wage differentials are similarly unimportant in poor women's residential choices: they are as likely to move to states with low wages as they are to settle in states with high wages. Evidently, interstate differences in welfare benefits and wages are too small to affect residential choices when the costs of moving are also considered.

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[23] Cebula, Richard J. 1979. *The Determinants of Human Migration*. Lexington, MA: D.C. Heath and Company.

38. Poor women's sensitivity to costs is clearly registered in Table 2, where spatial differences in cost-of-living are negatively and significantly related to residential choices. Our sample of respondents stayed where they were or else moved to states with lower living costs. In so doing, our respondents avoided states with higher benefits and wages, perhaps because they understood that moving to these states would not necessarily increase their purchasing power. There is no gain in purchasing power if higher prices for food, clothing and shelter consume any increase in income from wages or public assistance. In fact, purchasing power may fall upon moving to states with better wages and nominally higher benefits, if the cost of living is dramatically higher. This is a possibility that is generally overlooked by those who worry about the magnetic effects of welfare on the behavior of poor women.

39. We now turn to a second question: among a given state's poverty population, are recent migrants more likely than long-term residents to receive public assistance benefits? To answer this question I used the Current Population Surveys once more. This time, the statistical inquiries were limited to the most recent of the Annual Demographic Survey, the March 1994 installment. I included in the sample all individuals who could potentially qualify for such benefits: the entire adult population, in all fifty states and the District of Columbia. This initial sample provided over 112,000 cases.

40. The present efforts to model public assistance recipiency builds on similar models of AFDC participation. Thus, the model controls for age, race, sex and education along with covariates for state of residence and

poverty status. In these preliminary models the covariates for state of residence and poverty extracted (or controlled for) the impact of being poor and/or residing in various states. In these "fixed effect" models I uncovered no significant difference for being a recent migrant versus being a long-term resident. The fixed effect models were estimated with both a logit and a probit link function and with a binomial error variance. The "mover" variable was consistently insignificant.

41. The second set of estimates modelled the impact of various states of residence by using a random effects model. These estimates also uncovered no greater propensity among recent migrants, versus long-term residents, to receive public assistance monies.

42. These same models were estimated a third way: on a state-by-state basis with both logit and probit link functions. In these runs only Massachusetts and Ohio were found to have significant "mover" effects. For the state of Massachusetts, migrants were significantly *less* likely to receive funds. For Ohio, being a mover led to a very slight but significant increase in the likelihood of recipiency. It is important to note that in the other 49 locations, migration effects were insignificant and the two significant effects (i.e.: Ohio and Massachusetts) were in opposing directions.

43. The estimates for the state of California illustrate the larger pattern of results for the state-by-state estimates and are reported in Table Four. They have substantive importance, as well.

[Table Four Omitted]

44. The sample is limited to individuals in the state of California and who are below the poverty line in March of 1994. The variables in the model are as follows:

MOVER is coded one if an individual moved to the MSTSTATE from another state in the previous year;

AGE is the respondent's years of age;

RACE2 is coded one if the respondent is African-American, Asian or Hispanic;

INTERCEPT is where the regression line crosses the y axis. This parameter is fixed.

EDUC is a measure of the respondent's level of education.

PAWYN is the dependent variable and is coded one if the respondent currently received cash public assistance.

45. The MOVER variable in Table Four is weak and has a large standard error, thus it is remote from any standard level of statistical significance. Indeed, the chi-square is a minuscule .10 and the likelihood of a chance occurrence of the coefficient is very high at 75%. There is *no support* for the argument that recent poor migrants to California are more likely to be program recipients than long-term residents.

46. In order to capture the immense state-by-state variation in such programs and the complex way in which parameters might vary across states, I turned to a random effects model which has been used with some

frequency in the biomedical literature.[24] Such models are often referred to as empirical Bayes models by statisticians. This fourth framework enabled the estimation of differing slopes and intercepts across states. This set of estimates used a smaller number of cases – those who were currently at or below the poverty line and could qualify for assistance programs. Our sample size was reduced to just over 14,000 cases. Table Five provides our estimates:

[Table Five Omitted]

47. The variable names in the table are as follows:

MSTSTATE indicates the respondent's current state of residence as of March 1994. The coding use by the CPS follows that employed in the 1960 Census and moves from the Northeast (11 = Maine) and through the Midwest to the Far West (93 = California). In this coding, California is state number 93 and state number 14 is Massachusetts. The California's coefficient is -.09, a number which is not significantly different from zero. Massachusetts has the only significant coefficient for "mover" and it is negative.

MOVER is coded one if an individual moved to the MSTSTATE from another state in the previous year;

---

[24] See Laird, N.M. and J.H. Ware (1982) "Random Effects Models for Longitudinal Data," *Biometrics*, 38, 963-974. Rutter, C.M. and Elashoff, R.M. (1994) "Analysis of Longitudinal Data: Random Coefficient Regression Modelling," *Statistics in Medicine*, 13, 1211-1231.

AGE is the respondent's years of age;

RACE2 is coded one if the respondent is African-American, Asian or Hispanic;

INTERCEPT is where the regression line crosses the y axis. This parameter is free to vary across states.

PAWYN is the dependent variable and is coded one if the respondent currently received cash public assistance.

48. The results are clear cut: in only one state do we find a significant impact of migration on recipiency and it is negative. In Massachusetts, being a recent migrant to the state slightly reduces likelihood that one will receive assistance.

49. In summary, welfare benefits appear to exert *no impact* on the residential choices made by poor people. And, when the indigent relocate, they have *no greater propensity* to consume welfare benefits than the poor who are already within a state's borders.

I declare under penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct. Executed this 24 day of April 1997 at 2:24.

/s/ John Hartman
John Hartman

Affidavit Of Joan Zorza

[ATTORNEYS' NAMES OMITTED]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,	)	No.
Plaintiffs,	)	CLASS ACTION
v.	)	
ELOISE ANDERSON, Director of the California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California CRAIG BROWN, Director of the California Department of Finance,	)	AFFIDAVIT OF JOAN ZORZA, ESQ.
Defendants.	)	

CITY OF NEW YORK)
) ss:.
COUNTY OF NEW YORK)

I, Joan Zorza, Esq., hereby depose and say:

1. I am an attorney-at-law, editor of the Domestic Violence Report ("the Report"), a national publication on domestic violence, and President of the New York State Coalition Against Domestic Violence (NYSCADV). I have worked as a lawyer for the past sixteen years in the area of women's rights and family law, with a particular emphasis on domestic violence.

2. In addition to my overall legal experience, of particular relevance to this case is my work with poor battered women. At Greater Boston Legal Services in Boston, Massachusetts I represented litigants in domestic violence, divorce, custody and education law cases. At the National Battered Women's Law Project with the National Center on Women and Family Law, a legal services backup center, I provided various forms of assistance to advocates, policy makers and attorneys on legal issues faced by battered women. A copy of my resume is attached.

3. I have conducted extensive research and authored a number of articles on the intersection of welfare, poverty and domestic violence in the course of my work on domestic violence issues. These include *Woman Battering: A Major Cause of Homelessness*, 25 Clearinghouse Rev. 421 (1991); *Woman Battering: High Costs and the State of the Law*, 28 Clearinghouse Rev. 383 (1994); *Mandatory Arrest: A Step Toward Ending Domestic Violence*, 10 (3) Crim. Just. 2, American Bar Association (1995); and *Recognizing and Protecting the Privacy and confidentiality Needs of Battered Women*, 29 Fam. L.Q. 273 (1995). I have participated in training and speaking engagements on the impact of welfare reform on battered women, their safety and their inability to secure housing. I have a broad knowledge of the research regarding domestic violence and battered women. I am familiar with California's durational residency requirement as stated in the California Welfare and Institutions Code Section 11450.03(a) and feel well qualified to comment on the impact that California's durational residency requirement will have on battered women seeking welfare assistance.

4. Between three and four million women each year are battered by husbands, boyfriends and partners. *Domestic Violence: Not Just A Family Matter: Hearing Before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary*, 103d Cong., 2d Sess. (June 30, 1994) (statement of Senator Joseph Biden, Jr.). Poor women are particularly affected by this epidemic. Women aged 19 to 29 and women in families with incomes below $10,000 are more likely than other women to be victims of violence by an intimate. Ronet Bachman, *Violence Against Women: Estimates from the Redesigned Survey*, Bureau of Justice Statistics, U.S. Dep't of Justice, Aug. 1995, at 1.

5. In general, a durational residency requirement will result in the unequal treatment of poor people who move across state lines. This is especially true of women in abusive relationships who must often flee across state in order to escape domestic violence. *See* Martha F. Davis & Susan J. Kraham, *Protecting Women's Welfare in the Face of Violence*, 22 Fordham Urb. L.J. 1141, 1144 (1995) Battered women are often subjected to complete control and financial isolation by their batterers. Their economic vulnerability is exacerbated by their need to flee persistent and escalating violence, a situation which often results in short-term indigence. Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 J. Of L. and Pub. Policy 237, 244 (1994); Barbara P. Davidson & Pamela J. Jenkins, *Class Diversity in Shelter Life*, 34 Social Work 491, 492 (1989). Batterers commonly isolate women from financial resources, including access to cash, checking accounts or charge accounts. Lenore Walker, Battered Woman Syndrome 288 (1984). Lisa G. Lerman, *A Model State Act: Remedies for Domestic Abuse*, 21 Harv. J. On Legis. 61, 90

(1984). Moreover, these women face a high-risk of homelessness and other poverty-related ills. Ellen L. Bassuk, Angela Browne & John Buckner, *Single Mothers and Welfare*, Scientific American 60, 62 (Oct. 1996). Battered women with or without children comprise a significant portion of the homeless population. A move across state lines is often their only recourse in protecting themselves and their children from violence at the hands of an abuser.

6. Further, separation from an abusive partner is the most dangerous time for many battered women. Abusers do not lightly relinquish control and battering often increases after separation as abusers attempt to either coerce the woman into returning or to retaliate against for her leaving in the first place. *See* Mildred Pagelow, *Justice for Victims of Spouse Abuse in Divorce and Custody Cases*, 8 Violence and Victims 69, 77 (1993); Margo Wilson and Martin Daly, Spousal Homicide Risk and Estrangement, 8 Violence and Victims 3 (1993); Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich. L. Rev. 1, 5-6 (1991). Therefore, victims of domestic violence must often put great distance between themselves and their batterers in order to be safe. Shelter and emotional support from family members and friends who live in another state is often their only recourse during this critical period.

7. A residency requirement such as California's may have the effect of perpetuating domestic violence, given battered women's increased economic need at a particularly vulnerable time. My research, as well as that of others, has documented that access to economic resources and housing are significant factors in battered women's

ability to escape and remain separate from their abusers. Without access to the support necessary to survive at a minimal level, a victim of domestic violence may be forced to choose between abuse or homelessness and indigence. *See* Mary Anne Allard, Randy Albelda, Mary Ellen Colten & Carol Cosenza, *In Harm's Way? Domestic Violence, AFDC Receipt, and Welfare Reform in Massachusetts*, Center for Survey Research, University of Massachusetts – Boston (Feb. 1997). This would be particularly true in a state with a high cost of living like California.

8. In sum, the denial of adequate assistance to battered women who flee across state lines to escape abuse will only exacerbate the physical, psychological and financial obstacles these women face.

/s/ Joan Zorza
Joan Zorza, Esq.

Sworn to before me this
23rd day of April, 1997

/s/ Kathryn J. Rodgers
Notary Public

KATHRYN J. RODGERS
Notary Public
State of New York, No. 02R04516360
Qualified In New York County
Commission Expires April 30, 1999

Declaration Of David S. Schwartz
In Support Of Preliminary Injunction (Excerpts)

[ATTORNEYS' NAMES OMITTED]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated, Plaintiffs, v. ELOISE ANDERSON, Director of the California Department of Social Services, et al. Defendants.	NO. CIV-S-97-0529 DFL JFM CLASS ACTION **DECLARATION OF DAVID S. SCHWARTZ IN SUPPORT OF PRELIMINARY INJUNCTION** Date: May 16, 1997 Time: 9:00 a.m.

* * *

2. Many of the exhibits filed with plaintiffs' moving papers in support of the pending motion for preliminary injunction were previously filed with this court in connection with *Green v. Anderson*, 811 F.Supp. 516 (E.D. Cal. 1993). Those previously-filed exhibits include *all* of the exhibits relating to the legislative history of proposed statutory predecessors to Cal. Welf. & Inst. Code § 11450.03, to which defendants have objected in their opposition to the pending motion for preliminary injunction. Specifically, plaintiffs exhibits nos. 1, 4-13 were all filed with this Court in *Green*. For the Court's ease of

reference, these exhibits bear the same exhibit numbers in this case as they were assigned by plaintiffs in *Green*.

3. Attached hereto as Exhibit A is a true and correct copy of a brief filed by the United States in *V.C. v. Whitburn*, Civ. No. 94-C-1028, in the United States District Court for the Eastern District of Wisconsin. That case, like this case and *Green*, involved a two-tier AFDC benefit system in Wisconsin resulting from a durational residency requirement which would have provided less than full Wisconsin benefits to persons who had not resided within the state for six months.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 25th day of April, 1997, at Los Angeles, California.

/s/ David S. Schwartz
DAVID S. SCHWARTZ

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

V.C., *et al.*, Plaintiffs, v. GERALD WHITBURN, *et al.*, Defendants.	Civil Action No. 94-C-1028 (Curran, J.)

FEDERAL DEFENDANTS' SUPPLEMENTAL RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I.

STATEMENT

On December 23, 1994, defendants Donna Shalala, Secretary of the U.S. Department of Health and Human Services ("HHS"), Mary Jo Bane, Assistant Secretary for Children and Families at HHS, and Bruce Vladeck, Administrator of the Health Care Financing Administration of HHS (collectively "federal defendants"), filed their Response to Plaintiffs' Motion for Preliminary Injunction ("Response"). In their Response, federal defendants explained that under existing United States Supreme Court precedent, any two-tier benefits system, including the one employed here by the State of Wisconsin in its aid to Families with Dependent Children ("AFDC") demonstration project, raises serious constitutional questions. At the time we filed the Response, however, federal defendants believed that the Supreme

Court's resolution of *Anderson v. Green, cert. granted,* ___ U.S. ___, 115 S. Ct. 306 (1994), would bear significantly on the constitutional issues raised by plaintiffs here. In light of both these factors, in their December 23, 1994 Response, federal defendants stated that they did not object to the entry of a preliminary injunction in this case pending a decision by the Supreme Court in the *Green* case.

However, in a short *per curiam* decision, the Supreme Court vacated the judgment in *Anderson v. Green* on February 22, 1995, concluding that there was no justiciable controversy before it and that, therefore, the case was not ripe for decision. ___ U.S. ___, 115 S. Ct. 1059 (1995). The effect of this action is to leave undisturbed the Supreme Court precedent which existed prior to the grant of *certiorari* in *Green*.

Federal defendants believe that this governing Supreme Court precedent renders it unlikely that a lower court would find the Wisconsin project constitutional. For that reason, federal defendants do not object to this Court's granting plaintiffs' request for a preliminary injunction. The issuance of a preliminary injunction would preserve the *status quo* with respect to the challenged Wisconsin two-tier demonstration project, would facilitate the litigation and resolution of the constitutional issues in this case, and preserve the possibility of presenting the Supreme Court with a ripe constitutional issue.

II.

ARGUMENT

Wisconsin's AFDC Two-Tier Demonstration Project Raises Serious Constitutional Questions And As A Result Plaintiffs' Request For Preliminary Injunction Should Be Granted

As federal defendants have explained previously, in a line of cases that dates back at least to *Edwards v. People of the State of California,* 314 U.S. 160 (1941), the Supreme Court has repeatedly invalidated state provisions that deny or restrict benefits to state residents based on the recency of their arrival. *See, e.g., Attorney General of New York v. Soto-Lopez,* 476 U.S. 898 (1986); *Hooper v. Bernalillo County Assessor,* 472 U.S. 612 (1985); *Zobel v. Williams,* 457 U.S. 55 (1982); *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1973); *Shapiro v. Thompson,* 394 U.S. 618 (1969). The Supreme Court has demonstrated particular concern with protection of the indigent.

Most on point for purposes of this litigation is *Shapiro v. Thompson,* 394 U.S. 618 (1969), where the Court considered provisions of several different statutes which denied all AFDC benefits to residents of less than one year. Finding that the durational residency requirements penalized the exercise of the right to travel, the Supreme Court's analysis relied both on the constitutional right to travel and on equal protection principles. *See* 394 U.S. at 629-631. The Supreme Court concluded that

> even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional. But, of course, the traditional criteria do not apply in

> these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest. Under this standard, the waiting-period requirement clearly violates the Equal Protection Clause.

Id. at 648 (footnotes omitted).

There are several distinctions between this case and *Shapiro*. First, under the Wisconsin two-tier demonstration project, which is being employed in only four of Wisconsin's 72 counties, recent residents of Milwaukee, Racine, Kenosha and Rock counties would receive the amount of AFDC benefits payable in their former state of residence, regardless of whether they are higher or lower than Wisconsin-level AFDC benefits. In some instances, this may result in beneficiaries faring better than they would have in their prior state of residence. *See, e.g.*, Affidavit of Donna Cochems in Opposition to Motion for Temporary Injunction at 9-12, filed on December 23, 1994 in support of state defendants' Opposition To Motion For Preliminary Injunction. Second, if new residents in the four demonstration counties moved outside of these counties, they would immediately be eligible for full Wisconsin-level AFDC benefits. Third, AFDC benefits for recent residents in the four Wisconsin demonstration counties are affected for only a six-month period.[1] As the Supreme Court recognized in *Memorial Hospital*,

---

[1] Excluded from the two-tier project are persons who at any time previously resided in Wisconsin for at least six months, and persons who apply for AFDC benefits more than 90 days after their arrival to Wisconsin if they have worked for at least 13 weeks. *See* Plaintiffs' Brief in Support of Preliminary Injunction and Temporary Restraining Order at 5 and Exhibit 2 thereto, filed September 13, 1994.

> [a]lthough any durational residence requirement impinges to some extent on the right to travel, the Court in *Shapiro* did not declare such a requirement to be per se unconstitutional. The Court's holding was conditioned . . . by the caveat that some "waiting period residence requirements . . . may not be penalties upon the exercise of the constitutional right of interstate travel." The amount of impact required to give rise to the compelling-state-interest test was not made clear [in *Shapiro v. Thompson*].

415 U.S. at 256-57 (citations omitted).

Nonetheless, federal defendants believe that under existing Supreme Court precedent, the Wisconsin demonstration project would not be held constitutional despite these distinctions, considered either individually or in their entirety. The Supreme Court cases make clear that the relevant comparison has consistently been between new and longtime residents of the same state. *See Attorney General of New York v. Soto-Lopez*, 476 U.S. at 904 (plurality opinion) ("[t]he analysis in all of these cases, however, is informed by the same guiding principle – the right to migrate protects residents of a State from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from other similarly situated residents."). In *Zobel v. Williams*, 457 U.S. 55 (1982), for example, the Supreme Court struck down an Alaska law that granted longtime state residents increased shares of the State's mineral revenues, despite the fact that no other state offered a similar distribution.

The reasons articulated by Wisconsin for the two-tier system would not establish a compelling state interest, and might not even constitute a permissible purpose under the Supreme Court's prior decisions. *Compare Shapiro v. Thompson*, 394 U.S. at 629-631 (durational residency requirement impermissibly penalizes fundamental right to travel, necessitating a compelling state interest) *with Zobel v. Williams*, 457 U.S. at 58-60 (distribution of benefits based on length of residence violates Equal Protection Clause under rational basis review).

Wisconsin has offered at least two reasons why it has proceeded with the two-tier demonstration project. First, "because Wisconsin has finite resources to devote to public welfare programs, the state needs to know whether there are likely to be greater or lesser demands on those resources and needs to know which of its welfare programs are most attractive to its recipient population. . . . [This will] 'help the state carry out its programming and budgeting activities in coming years.' " Brief of Defendants Gerald Whitburn and J. Jean Rogers in Opposition to Motion for Preliminary Injunction ("Opposition") at 44-45 (citations omitted).

As plaintiffs point out, however, similar arguments have been raised and rejected by the Supreme Court as illegitimate state objectives. Plaintiffs' Supplemental Brief In Support Of Preliminary Injunction at 27-29. *See, e.g., Shapiro*, 394 U.S. at 633 ("neither deterrence of indigents from migrating to the State nor limitation of welfare benefits to those regarded as contributing to the State is a constitutionally permissible state objective"); *id.* at 631 ("a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence

out indigents generally); *Zobel v. Williams*, 457 U.S. at 63 (desire "to reward citizens for past contributions" is not a valid state objective); *Hooper v. Bernalillo County Assessor*, 472 U.S. at 623 ("[t]he State may not favor established residents over new residents based on the view that the State may take care of 'its own,' if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, become the State's 'own' and may not be discriminated against solely on the basis of their [recent] arrival in the State. . . . ").

As the district court stated in *Green v. Anderson* in striking down California's two-tier AFDC demonstration project,

> even if the measure were viewed not as a penalty but as similar to the bounty in *Zobel*, it would still be impermissible under the analysis in *Zobel*. If the measure intends to deter settlement into the state of persons who need welfare and seek a higher benefit, it is sensibly designed but has an unconstitutional purpose. If the measure simply seeks to save costs, defendants fail to explain why new residents are better able to bear a reduction in benefits than other residents. . . . [U]nless the purpose here is to deter migration, there is no other rational basis for the distinction drawn among applicants all of whom are California residents.

811 F. Supp. 516, 522-23 (E.D. Cal. 1993). Thus, it is clear, at a minimum, that the very issue of whether at least some of the reasons supplied by Wisconsin could pass constitutional muster as either a compelling or even permissible state interest raises difficult questions.

Wisconsin has also stated that the second purpose of the demonstration project "is to provide information which 'will assist the federal government in considering the appropriateness of setting a regional or national AFDC standard.' . . . If the demonstration project shows that higher AFDC benefits in Wisconsin creates a pull for migration, the project will demonstrate that the problems of child poverty are inequitably shared by higher-benefit and lower-benefit states." Opposition at 45-46 (citations omitted). This second purpose articulated by Wisconsin has not been addressed directly by the Supreme Court, however.

Federal defendants believed that a Supreme Court decision in *Anderson v. Green* would have had a significant impact on the constitutional issues presented here. The question which the Supreme Court took up on *certiorari* in *Green* was whether it is constitutionally permissible for a state to limit a new resident's AFDC benefits to the lower of either the level of benefits received or receivable in the state of prior residence, or the new state's benefit levels, for a period of one year. However, at the *Green* oral argument on January 17, 1995, the State of California stated that even if it prevailed in the Supreme Court, the two-tier demonstration project could not go forward since the state lacked the necessary HHS waivers. *See Anderson v. Green*, ___ U.S. ___, 115 S. Ct. at 1060. Concluding that "[t]he parties have no live dispute now, and whether one will arise in the future is conjectural," the Court held that there was no justiciable controversy before it and that therefore the case was not ripe for

decision. *Id.*[2] As a result, the Court vacated the prior judgments in the case, and remanded the case to the district court with directions to dismiss the case. *Id.* at 1060-61. The Supreme Court stated that "[v]acatur is appropriate . . . to 'clea[r] the path for future relitigation of the issues between parties and [to] eliminat[e] a judgment, review of which was prevented through happenstance.' " *Id.* at 1060-61, citing *United States v. Munsingwear*, 340 U.S. 36, 40 (1950).

The effect of the Supreme Court's failure to issue a decision on the merits in *Anderson v. Green* is to leave undisturbed the Supreme Court precedent which existed prior to the grant of *certiorari*. Based on that precedent, federal defendants believe that plaintiffs are likely to succeed on the merits of their constitutional claims, at least in the lower courts, and therefore do not object to this Court's entry of a preliminary injunction with respect to the Wisconsin two-tier demonstration project. This would, in the words of the Supreme Court, clear the path for future relitigation and resolution of similar constitutional issues to those presented in *Anderson v. Green*.[3]

---

[2] In a separate proceeding, *Beno v. Shalala*, 30 F.3d 1057, 1073-76 (9th Cir. 1994), the Ninth Circuit vacated the waiver granted previously by HHS, concluding that the Secretary of HHS had not adequately considered the objections to California's two-tier project. *See Anderson v. Green*, ___ U.S. ___, 115 S. Ct. at 1050.

[3] While federal defendants have indicated that under existing Supreme Court precedent the Wisconsin two-tier demonstration project will likely not be held constitutional in the lower courts, the Supreme Court has demonstrated an interest in the underlying constitutional issues by granting *certiorari* in *Anderson v. Green*. The Supreme Court has also

III.

CONCLUSION

For the foregoing reasons, based on the likelihood that plaintiffs will ultimately succeed on the merits of their constitutional claims in this Court, federal defendants do not object to this Court granting plaintiffs' request for a preliminary injunction.

May 17, 1995

Respectfully submitted,

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Assistant Attorney General

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/s/ Sheila M. Lieber/ABK
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---

indicated, however, that if HHS withdraws the waivers necessary to enable a project to proceed, it will dismiss the case as moot. Federal defendants have decided to continue the existing waiver for the Wisconsin project in order to enable the Supreme Court, if it so chooses, to hear and decide the constitutional issues in this case.

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(10)

No. 98-97

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In The

Supreme Court of the United States

October Term, 1998

ELOISE ANDERSON, Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; and CRAIG L. BROWN, Director, California Department of Finance,

Petitioners,

v.

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Does a trial court err in subjecting to strict scrutiny a federally-authorized statute which does not penalize any fundamental right, and which merely limits for a period of one year a new resident's cash aid welfare benefits to the maximum amount receivable in the state of prior residence?

PARTIES

Petitioners, who were defendants below, are Eloise Anderson, Director of the California Department of Social Services, the California Department of Social Services, the Honorable Pete Wilson, Governor of the State of California, and Craig L. Brown, Director of the California Department of Finance. Petitioners will be referred to herein as "California." Named respondents, plaintiffs below, are Brenda Roe and Anna Doe. On April 23, 1997, on the stipulation of the parties, the trial court permitted this action to be maintained as a class action and certified a class of plaintiffs defined as "all present and future AFDC and TANF applicants and recipients who have applied or will apply for AFDC or TANF on or after April 1, 1997, and who will be denied full California AFDC or TANF benefits because they have not resided in California for twelve consecutive months immediately preceding their application for aid."

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PETITIONERS' BRIEF ON THE MERITS

The petitioners, Eloise Anderson, Director, California Department of Social Services; California Department of Social Services; the Honorable Pete Wilson, Governor of the State of California; and Craig L. Brown, Director, California Department of Finance (hereafter, "California"), respectfully submit their Brief on the Merits.

OPINIONS BELOW

The decision of the Court of Appeals, *Roe v. Anderson*, is reported at 134 F.3d 1400 (9th Cir. 1998) and is reprinted in the Appendix to the Petition for Writ of Certiorari ("Pet.App.") at 1-12. The decision of the Court of Appeals denying the Petition for Rehearing is reprinted in the Appendix to the Petition for Writ of Certiorari at Pet.App. 34. The decision of the trial court is reported at 966 F. Supp. 977 (E.D. Cal. 1997), and is reprinted in the Appendix at Pet.App. 13.

JURISDICTION

On January 28, 1998, the United States Court of Appeals for the Ninth Circuit ("the Ninth Circuit") issued its opinion, affirming the preliminary injunction granted by the United States District Court for the Eastern District of California ("the trial court"). California subsequently filed a petition for rehearing with the Ninth Circuit, which was denied on April 10, 1998. A timely petition for writ of certiorari was filed in this Court on July 9, 1998,

and placed on the docket July 20, 1998. Certiorari was granted on September 29, 1998. This Court has jurisdiction to review, by way of writ of certiorari, the judgment or decree of the Court of Appeals. 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

California Welfare and Institutions Code section 11450.03:

> (a) Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.
>
> (b) This section shall not become operative until the date of approval by the United States Secretary of Health and Human Services necessary to implement the provisions of this section so as to ensure the continued compliance of the state plan for the following:
>
> > (1) Title IV of the federal Social Security Act (Subchapter 4 (commencing with Section 601) of Chapter 7 of Title 42 of the United States Code).
> >
> > (2) Title IX of the federal Social Security Act (Subchapter 19 (commencing with Section 1396) of Chapter 7 of Title 42 of the United States Code).

(Added by Stats. 1992, c. 722 (S.B.485), § 37.5, eff. Sept. 15, 1992.)

42 United States Code section 604(c):

> A State operating a program funded under this part may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months.

(Aug. 14, 1935, c. 531, Title IV, § 404, as added Aug. 22, 1996, Pub. L. 104-193, Title I § 103(a)(1), 110 Stat. 2124, and amended Aug. 5, 1997, Pub. L. 105-33, Title V, §§ 5002(a), 5503, 5514(c), 111 Stat. 593, 609, 620.)

STATEMENT OF THE CASE

Four years ago, this Court granted certiorari to consider the constitutionality of California Welfare and Institutions Code section 11450.03, the same statute at issue here. *Anderson v. Green*, 513 U.S. 922 (1994). However, the merits of California's argument were not addressed at that time because the matter in its then current posture was not ripe. *Anderson v. Green*, 513 U.S. 557 (1995). Due to changes mandated by federal welfare reform, the issues presented by implementation of California's statute are now ripe for decision. This Court has granted certiorari to consider the appropriate standard of review.

Aid to Families with Dependent Children ("AFDC"), and its replacement, Temporary Assistance to Needy Families ("TANF"), have historically been California's

largest welfare payments programs.[1] In the most recent fiscal year for which actual expenditures were available (fiscal year 1995-1996), California provided AFDC to an average of 2,645,814 persons per month, at an annual cost of $6 billion. Of that total amount, $2.9 billion came from the California state general fund. Declaration of Bruce Wagstaff, "Wagstaff Declaration," Pet.App. 36.

Based on information provided by the United States Department of Health and Human Services for the fiscal year 1996-1997, California had the highest grant level of the 10 most populous states and the sixth highest grant level in the entire United States. Wagstaff Declaration, Pet.App. 36. Although California accounted for 29 percent of all money spent nationwide on the AFDC program, and 10 percent of the national AFDC caseload, it had only 12 percent of the nation's population. Wagstaff Declaration, Pet.App. 36-37.

In 1992, a time of continuing economic and fiscal problems in California, the State initiated a federally-approved, time-limited experimental project to reform its

[1] The federal AFDC program was repealed and replaced with the new TANF program as part of federal welfare reform. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, Title I, § 103(a)(1), Aug. 22, 1996, 110 Stat. 2112. On January 1, 1998, California's welfare program was renamed the California Work Opportunity and Responsibility to Kids program, referred to as CalWORKs. Cal. Welf. & Inst. Code §§ 10063 and 11200. The substitution of TANF for the federal AFDC program, and CalWORKs for the state AFDC program does not affect California's ability to implement the durational residency requirement at issue here.

mammoth AFDC program. Declaration of Dennis Hordyk, attached to Declaration of Theodore Garelis, "Garelis Declaration," and Garelis Declaration, Pet.App. 42 and 44. In conjunction with this experimental project in 1992, the California Legislature enacted, with strong bipartisan support, California Welfare and Institutions Code section 11450.03 ("section 11450.03").[2]

Section 11450.03 provides for a durational residency requirement for the provision of AFDC benefits. Under this statute, new California residents will receive for one year the lower of either the maximum cash aid amount they could have received in their state of prior residence, or the amount of cash aid received by existing California residents.

The experimental project consisted not only of section 11450.03 but work incentive grant reductions, extension of the earnings disregard under which working AFDC recipients can keep more of their earnings without a corresponding reduction in benefits, and elimination of the 100-hour rule under which two-parent AFDC recipient families may remain eligible for benefits despite working more than 100 hours per month. *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994). In 1993, the California Legislature amended the experiment to add new and important elements to the reform effort: (1) an increase from

[2] Senate Bill 485, the precursor to section 11450.03, passed in the California Senate on a vote of 21 to 11. It passed in the California Assembly on a vote of 54 to 25. The Senate concurred in the Assembly amendments on a vote of 29 to 9. California Senate Final History 1991-1992, Regular Session, Volume I, pp. 381-382.

$1,000 to $2,000 in the value of resources an AFDC family can possess and still qualify for benefits, California Welfare and Institutions Code section 11155.1(a); (2) an increase in the allowable value of the recipient family's automobile from $2,000 to $4,500, California Welfare and Institutions Code section 11155.1(a); (3) additional funding for child care to enable more recipients to participate in employment and training activities; and (4) the Cal-Learn Program, which is a $50 million program providing pregnant and parenting teens with cash bonuses for satisfactory school progress, intensive case management services, child care, and other supportive services. California Welfare and Institutions Code section 11331, et seq.

In order to implement the experimental project, including section 11450.03, California obtained waivers of various provisions of federal statutes and regulations, including the Medicaid Maintenance of Effort requirement and various provisions of regulations at 45 Code of Federal Regulations sections 233.20(a)(1) and (2). Garelis Declaration, Pet.App. 42 and Exhibit B thereto, Pet.App. 47.

In response to a challenge on constitutional grounds to California's implementation of section 11450.03, the trial court issued a temporary restraining order on December 22, 1992, enjoining California from implementing the provisions of section 11450.03 pending a hearing on plaintiffs' request for a preliminary injunction. The preliminary injunction was issued by the trial court from the bench on January 28, 1993. *Green v. Anderson*, 811 F. Supp. 516, 523 (E.D. Cal. 1993).

California filed an appeal from the preliminary injunction. On April 29, 1994, the Ninth Circuit summarily affirmed the trial court's order granting the preliminary injunction. *Green v. Anderson*, 26 F.3d 95 (9th Cir. 1994). This Court subsequently granted California's petition for writ of certiorari. *Anderson v. Green*, 513 U.S. 922 (1994). Following briefing and oral argument, this Court held that no justiciable controversy was before it because the action in its then current posture was not ripe. *Anderson v. Green*, 513 U.S. 557 (1995). This was a result of the vacation by the Ninth Circuit of one of the waivers of federal law (the Medicaid Maintenance of Effort requirement) necessary for implementation of section 11450.03. *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994).

Subsequently, California requested a renewed waiver of the Medicaid Maintenance of Effort requirement from the Secretary of the United States Department of Health and Human Services. That renewed waiver was granted, but, at the same time, the Secretary retracted the waiver of federal authority necessary for implementation of section 11450.03. Garelis Declaration, Pet.App. 42 and Exhibit C thereto, Pet.App. 52.

As a result of Congressional efforts to redesign an out-of-date welfare system, on August 22, 1996, President Clinton signed the federal welfare reform bill, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), 42 U.S.C. § 601, et seq. The federal AFDC program was repealed and replaced with a new program, Temporary Assistance to Needy Families ("TANF"). One of the major differences between the new TANF program and the former AFDC program is that

under TANF, welfare benefits are no longer federal entitlements. 42 U.S.C. § 601(b). Additionally, as part of PRWORA, Congress explicitly authorized states to enact durational residency requirements, such as section 11450.03, in their individual TANF plans. 42 U.S.C. § 604(c). The rationale for Congressional authorization of durational residency requirements was to avoid the creation of country-wide welfare magnets in high benefit-level states. H.R. Rep. No. 104-651, at 1337 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2396. Congress thus protected states that use their block grants for high benefit levels from becoming "welfare magnets." A third major difference between the TANF and AFDC programs is that under PRWORA, Congress authorized states to limit the receipt of TANF benefits for periods of time up to five years. 42 U.S.C. § 608(a)(7)(A). Pursuant to this authorization, California has chosen to allow its residents benefits for the maximum five-year period. Cal. Welf. & Inst. Code § 11454(b).

Pursuant to the authorization contained in PRWORA, on February 28, 1997, California once again instructed its counties to implement section 11450.03 beginning April 1, 1997. Plaintiffs then moved to block implementation of section 11450.03, by filing the underlying complaint for declaratory and injunctive relief ("the complaint") on April 1, 1997. Plaintiffs contended that section 11450.03 violated various provisions of the United States Constitution and the constitutional right to travel. Pet.App. 7-9.

The complaint named the California Department of Social Services, the directors of the California Departments of Social Services and Finance and the Governor of the State of California as defendants. Plaintiffs are a class

of California residents who have applied or will apply for benefits on or after April 1, 1997, who have not resided in California for twelve consecutive months immediately preceding their application for aid, and whose cash aid will be limited for a period of one year to the maximum amount receivable in their prior state of residence. Jurisdiction was conferred on the District Court by 28 United States Code section 1343(a)(3). The action was brought pursuant to 28 United States Code section 1983.

On April 1, 1997, the District Court granted plaintiffs' application for a temporary restraining order and enjoined implementation of section 11450.03 pending a hearing on plaintiffs' request for a preliminary injunction. Pet.App. 20. Plaintiffs' request for a preliminary injunction was heard on May 16, 1997. Pet.App. 41. The District Court took the matter under submission and issued an order on June 4, 1997, granting the preliminary injunction. The District Court held that, under what it perceived to be governing precedent, it was required to find that section 11450.03 penalizes the right to travel. *Roe v. Anderson*, 966 F. Supp. 977 (E.D. Cal. 1997); Pet.App. 13.

California appealed the order granting the preliminary injunction to the Ninth Circuit. On January 28, 1998, the Ninth Circuit issued an opinion affirming the order of the District Court. *Roe v. Anderson*, 134 F.3d 1400 (9th Cir. 1998); Pet.App. 1. The Ninth Circuit based its erroneous holding on its earlier opinion in *Green* that implementation of section 11450.03 penalizes the right to travel and thus should be subjected to a strict scrutiny standard of review. The Ninth Circuit also based its opinion on an

incorrect statement of the standard of review for preliminary injunctive relief, departing from controlling precedent of this Court. Pet.App. 3, n. 1.[3] California sought rehearing only as to the incorrect standard of review for preliminary injunctive relief, without waiving future review of other issues raised by the Ninth Circuit's opinion. On April 10, 1998, the Ninth Circuit summarily denied California's request for rehearing.

Relying at least in part on the Congressional authorization conferred by PRWORA, other states have enacted similar durational residency requirements. These states include, among others, Rhode Island, *Westenfelder v. Ferguson*, 998 F. Supp 146 (D. R.I. 1998) (order granting preliminary injunction), *appeal docketed*, No. 98-1431 (1st Cir. May 14, 1998); Pennsylvania, *Maldonado v. Houstoun*, No. 97-1893, 1998 WL 569359 (3d Cir. 1998); Minnesota, *Davis et al. v. Doth*, No. 62-C6-97-010231 (Minn. St. Dist. Ct. Dec. 5, 1997) (order granting temporary injunction); Washington, *Ruffin, et al. v. Quasim*, No. C97-5767 FDB (W.D. Wa. Feb. 6, 1998) (order granting preliminary

[3] California's Petition for Writ of Certiorari did not address the incorrect articulation of the standard of review for preliminary injunctive relief by the Ninth Circuit. Despite this incorrect articulation of the preliminary injunctive standard of review, the Ninth Circuit acknowledged that an abuse of discretion will be found where the trial court "base[s] its ruling on an erroneous view of the law." Pet.App. 3, n. 1. As argued below, the trial court did base its ruling on an erroneous view of the law, thus erring in granting the preliminary injunction.

injunction); and New Jersey, *Sanchez v. Department of Human Services*, 314 N.J. Super. 11, 713 A.2d 1056 (1998).

SUMMARY OF THE ARGUMENT

The constitutionality of statutes in the area of economics and social welfare involving the administration of public welfare assistance is reviewed under a rational basis analysis. Strict scrutiny, by contrast, is reserved for statutes adversely impacting either a suspect class, or a fundamental right. Because section 11450.03 temporarily sets levels of cash aid for new California residents at the constitutionally permissible amount of aid receivable in their state of prior residence, new California residents are in no worse position, as a result of the operation of the statute, than if they had not moved to California. Accordingly, California's statute neither impacts nor penalizes the right to travel and the constitutionality of section 11450.03 is to be determined by a rational basis analysis.

Furthermore, section 11450.03 does not permanently classify new state residents as restricted to a lower amount of cash aid. This case thus presents a different situation from previous cases in which this Court struck down state laws that, by withdrawing benefits altogether, penalized the right to travel and triggered strict scrutiny.

Even if section 11450.03 does have some impact on the right to travel, that impact is, at best, remote and incidental. Statutes that do not raise a significant barrier

to interstate migration should be analyzed under the traditional rational basis test.

ARGUMENT

I

BECAUSE CALIFORNIA WELFARE AND INSTITUTIONS CODE SECTION 11450.03 OPERATES MERELY AS A BENEFIT LEVEL ADJUSTMENT, THE LOWER COURTS ERRED IN SUBJECTING THE STATUTE TO A STRICT SCRUTINY ANALYSIS

In an attempt to reform the welfare system of this country, California and other states have experimented with a variety of responsible, creative solutions to assist their indigent residents in removing themselves from the welfare rolls. Congress joined this effort to reform the welfare system two years ago, passing PRWORA, and therein authorizing states to implement durational residency requirements. See 42 U.S.C. § 604(c).

As of 1992, California had already adopted such a requirement on a bipartisan basis. Cal. Welf. & Inst. Code § 11450.03. Under this statute, new California residents will receive for one year the lower of either the maximum cash aid amount they could have received in their state of prior residence, or the amount of cash aid received by existing California residents. However, California's implementation of section 11450.03 has been hampered by an ongoing constitutional challenge to the statute, and by the application of an incorrect standard of review. Instead of a rational basis review, appropriate for review of a statute setting welfare benefit levels, the lower courts

departed from controlling precedent of this Court and subjected section 11450.03 to a strict scrutiny analysis.

These courts have misunderstood the holding of this Court that:

> [w]hen a state distributes benefits unequally, the distinctions it makes are subject to review under the Equal Protection Clause of the Fourteenth Amendment. Generally, a law will survive that scrutiny if the distinction it makes rationally furthers a legitimate state purpose.

Zobel v. Williams, 457 U.S. 55, 60 (1982).

Controlling precedent from this Court states that a reasonable or rational basis analysis is the appropriate constitutional review for statutes in the area of economics and social welfare involving the administration of public welfare assistance. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). Such is the case here, thereby compelling a rational basis analysis.

Departing from the precedent this Court established in *Dandridge*, the lower courts erred by applying strict scrutiny. In affirming the trial court's order granting a preliminary injunction, the Ninth Circuit reiterated its prior opinion in this ongoing litigation, *Green v. Anderson*, 26 F.3d 95 (9th Cir. 1994), summarily affirming the prior preliminary order enjoining implementation of section 11450.03. *Roe v. Anderson*, 134 F.3d 1400 (9th Cir. 1998). The *Green* trial court had erroneously found that section 11450.03 penalized the right to travel and, therefore, erroneously subjected the statute to a strict scrutiny analysis. *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993).

However, statutes such as the one at issue here, with a primary focus on setting benefit levels, are to be analyzed under the same rational basis standard to which public welfare assistance statutes are normally subjected. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). In *Dandridge*, this Court held that a statute which disregarded family size and established a benefit level below the cost of living or the standard of need and which encouraged gainful employment, involved the administration of public welfare assistance. Therefore, such a statute was to be reviewed under the rational basis standard. Furthermore, this Court held that such statutes were constitutional. *Id.* at 480, 485. Since section 11450.03 merely adjusts cash aid amounts, it similarly should be reviewed under a rational basis analysis.

In order to subject a statute to strict scrutiny review, it must be shown that the statute either impacts a suspect class, or a fundamental right. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16 (1973), *rhg. denied*, 411 U.S. 959 (1973). Here, no suspect class has been adversely impacted or even identified. The Ninth Circuit erroneously adopted the legal fiction (indulged in by the trial court), that section 11450.03 adversely impacts the fundamental right of interstate travel. In so holding, the trial court erroneously expanded the reach of *Shapiro v. Thompson*, 394 U.S. 618 (1969), and its progeny to determine the issues in this litigation.

In *Shapiro*, this Court held that legislation which denied *all* welfare assistance to persons who had been state residents for less than a year was constitutionally impermissible because, as such legislation "touches on

the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest." *Shapiro*, 394 U.S. at 638.

To characterize *Shapiro* as barring implementation of section 11450.03 is totally unjustified, as this Court left that very question open:

> We imply no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right to interstate travel.

394 U.S. at 638, n. 21.

Thus, in *Shapiro*, this Court determined only that the complete denial of welfare assistance for a full year implicated the plaintiffs' right of interstate travel. As *Shapiro* addressed only the issue of denial of eligibility for welfare benefits, this Court did not determine whether a more limited statute, such as section 11450.03, which operates only to set levels of cash aid, implicates the right to travel.

This Court refined its analysis of state legislation affecting the right of travel in *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 258-259 (1974). There, this Court stated that *Shapiro* "stand[s] for the proposition that a classification which 'operates to *penalize* those persons . . . who have exercised their constitutional right of interstate migration,' must be justified by a compelling

state interest", 415 U.S. at 258, but repeated its prior statement in *Shapiro*, that "some 'waiting period[s] . . . may not be penalties.' " *Id.* at 258-259.

In both *Shapiro* and *Memorial Hospital* the plaintiffs' right to travel was penalized because they were put in a worse position by application of the statutes at issue after they moved to their new states. In *Shapiro*, the plaintiffs had a right to receive welfare assistance in their state of prior residence. After moving, they were no longer eligible for welfare assistance for a full year. In *Memorial Hospital*, the plaintiffs had a right to state-funded, non-emergency medical care before they moved. After they moved to Arizona, they were not eligible for non-emergency medical care for a period of twelve months. Thus, in both cases, the plaintiffs lost their eligibility for public assistance due solely to their moving to a new state. As a result, this Court determined that plaintiffs' right to travel had been implicated sufficiently to trigger strict scrutiny.

Under *Shapiro* and its progeny, this Court has held that a state statute sufficiently implicates the right to travel and therefore triggers strict scrutiny: (1) "when impeding [interstate] travel is its primary objective"; (2) "when it actually deters such travel" or (3) "when it uses any classification which serves to penalize the right to travel." *State Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 at 903 (1986) (citations and internal quotations omitted).

California's ability to implement section 11450.03 is unaffected by the holdings of *Shapiro* and its progeny. Unlike the plaintiffs in *Shapiro* and *Memorial Hospital*,

plaintiffs here have not lost any *eligibility* for public assistance which they enjoyed in their state of prior residence. California has no waiting period to establish eligibility. Thus, new California residents are immediately eligible for benefits under CalWORKs (the state TANF program) upon establishing residency. The only question in this litigation is the *amount* of cash aid new residents will receive.

Under section 11450.03, plaintiffs receive the same level of cash aid they received, or would have received, in their state of prior residence. Thus, as to the level of cash aid, plaintiffs have no change in their position and will suffer no detriment upon moving to California. In short, plaintiffs would not be any worse off as a result of the operation of section 11450.03 than they would have been had they not exercised their right to travel. They would lose no benefit that would have accrued to them had they not traveled to California. Plaintiffs thus have not been actually deterred from traveling to California and have not been penalized for exercise of that right. It thus cannot be said that the primary objective of section 11450.03 is to impede travel.[4]

---

[4] In order to buttress their claim that section 11450.03 is intended to actually prevent indigent people from moving to California (a purpose that does not appear in the wording of section 11450.03, nor in the legislative history of section 11450.03), plaintiffs rely on extraneous materials. Brief in Opposition to Petition for Writ of Certiorari, at 5-8. Those materials deal with California Proposition 165, a voter initiative that did not become law, and California Senate Bill 366, which also was not enacted into law. These materials are irrelevant to this Court's consideration of the statute, as neither Proposition 165 nor Senate Bill 366 is a precursor of section 11450.03. Plaintiffs have thus produced no relevant or credible evidence as to the primary objective of section 11450.03.

Furthermore, benefits under CalWORKs involve more than just cash aid. While only cash aid is addressed by section 11450.03, other CalWORKs benefits are unaffected. For instance, unlike other states, California allows recipients under its state TANF program the full five-year period of eligibility permitted by PRWORA. 42 U.S.C. § 608(a)(7)(A); Cal. Welf. & Inst. Code § 11454(b). Recipients who were subject to a shorter time period in their states of origin and who move to California will receive welfare benefits for the full five-year period. Furthermore, while children may have their aid terminated upon reaching the time limit in their state of prior residence, children residing in California continue to receive aid until they are 18, even if their caretaker relative has reached California's generous five-year limit on aid. Cal. Welf. & Inst. Code § 11454(b). Additionally, all California welfare recipients, including those subject to section 11450.03, are eligible for the full range of employment and training activities and accompanying supportive services (including child care) to enable them to move from welfare to work. Cal. Welf. & Inst. Code §§ 11320.1, 11322.6 and 11323.2. Persons subject to section 11450.03 receive no less than the maximum amount of cash aid which was constitutionally permissible in their state of prior residence, and they are eligible for all other benefits contained in California's welfare package. Since section 11450.03 neither implicates nor penalizes the right to travel, California need only show that section 11450.03 has a rational basis.

Plaintiffs argue that because California's cost of living is generally higher than elsewhere, the level of benefits provided for by section 11450.03 operates as a penalty

on new residents. However, even if it can be shown that the cost of living is uniformly higher in California than elsewhere, this is not sufficient to establish that section 11450.03 operates as a penalty *on the right to travel*. Furthermore, plaintiffs' argument assumes that the amount of cash aid received in the prior state of residence bears some rational relationship to the standard of need or the cost of living in that state. This assumption is wrong as there is no requirement for benefit levels to be related to anything other than budgetary constraints. Under the former AFDC program, many states had constitutionally adequate benefit levels that were much lower than the standard of need. *King v. Smith*, 392 U.S. 309, 334 (1968); *Dandridge v. Williams*, 397 U.S. 471, 480 (1970). The states had "undisputed power" under the Social Security Act "to set [both] the level of benefits and the standard of need" in the AFDC program. *King*, 392 U.S. at 334; *Jefferson v. Hackney*, 406 U.S. 535, 541, 545 (1972). This power of the states to set the amount of cash aid is even less subject to dispute under TANF than under AFDC, as the benefits at issue are no longer deemed to be federal entitlements. 42 U.S.C. § 601(b).

Nor are plaintiffs handicapped by the creation of *permanent* distinctions among residents and newcomers, as were the plaintiffs in *Zobel v. Williams*, 457 U.S. 55 (1982), *State Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986), and *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985). The statute at issue in *State Attorney General of New York v. Soto-Lopez* determined eligibility for veterans' preferences for civil service based upon state residency at the time of induction into the armed forces. Similarly, the statute at issue in *Hooper v. Bernalillo County*

Assessor determined eligibility for a property tax exemption based upon residency before a specific date.

Section 11450.03 does not determine or affect *eligibility* for welfare benefits. All persons subject to the provisions of section 11450.03 have been determined to be eligible for benefits in California. Section 11450.03 merely sets the amount of cash aid for those eligible recipients. Unlike plaintiffs in *Shapiro, Memorial Hospital, Hooper,* and *Soto-Lopez,* plaintiffs here are not foreclosed from welfare benefits under section 11450.03.

Under plaintiffs' theory, any difference in the level of any government service or benefit between states (or even a difference in laws pertaining to social, economic or domestic spheres) impacts the decision to travel to another state, and could therefore penalize the right to travel. This argument, of course, leads to absurd results.[5] States do not, and do not have to, maintain either similar welfare benefit levels, *Dandridge*, 397 U.S. at 480, or, for that matter, similar requirements relating to domestic relations, *Sosna v. Iowa*, 419 U.S. 393 (1975). Simply put, each state has its own distinct laws impacting the life of its residents, both old and new. Differences between states, even though at times major, do not penalize the

[5] If plaintiffs' argument were valid, it would then be unconstitutional for each state to maintain its own unique benefit level. Any state with a lower amount of cash aid than another state would be constitutionally required to raise its grant level, so as not to impact the right to travel.

right to travel. There is no constitutional guarantee that a move to a new state will come without differences.[6]

Thus, because new California residents will continue to be *eligible* for TANF benefits, restricted for a limited time only to the maximum *amount* receivable in their state of prior residence, section 11450.03 does not operate to implicate or penalize the right to travel to California. The lower courts erred in extending the principles in *Shapiro* by subjecting section 11450.03 to strict scrutiny. Instead, the lower courts should have applied the controlling precedent of *Dandridge* and analyzed section 11450.03 under a rational basis analysis.[7]

[6] Plaintiffs essentially argue that without the guarantee of a certain amount of cash aid, they cannot move to California. They are therefore arguing that California is constitutionally obligated to fund their move. No other newcomers to California have the ability to demand a certain payment level upon their decision to move to a new home – nor should they. As a general matter, a state is under no duty to subsidize the costs of the exercise of constitutional rights. In *Harris v. McRae,* 448 U.S. 297, 317-318 (1980), this Court held that a woman's freedom of choice does not carry with it a constitutional entitlement to the financial resources necessary to exercise that freedom. Here, California has not prohibited travel or placed an obstacle in the way of a newcomer's move to California; it has simply limited amounts of cash aid for recent California residents to no more than they received or would have received in their state of prior residence. This benefit level adjustment is no more an obstacle to travel than is the fact that California offers its existing residents a different package of welfare benefits – including grant levels and time limits – than the other states. New residents are free to travel to California, and TANF benefits remain available for recent California residents.

[7] To the extent that *Shapiro* and its progeny appear to hold that the constitutionality of a statute relating to the

II

A COMPARISON OF THE POSITION OF NEWCOMERS BEFORE AND AFTER TRAVEL TO CALIFORNIA DEMONSTRATES THAT SECTION 11450.03 DOES NOT PENALIZE NEW CALIFORNIA RESIDENTS

The determination as to whether section 11450.03 operates as a penalty on the decision to travel should be analyzed by ascertaining the effect of the statute on persons who have traveled, or who may travel, to California. Because only residents who have recently traveled to California are subject to the provisions of section 11450.03, the relevant constitutional inquiry is whether those recently arrived residents suffer a detriment due to a decision to travel to California. To determine whether such a detriment exists, one must compare the position of newcomers before and after travel to California. Here, as noted above, plaintiffs continue to receive, on a temporary basis, the maximum amount of cash aid receivable in their state of prior residence. Therefore, these newcomers have no change in position due to their move to California and their right to travel is not penalized by operation of section 11450.03.

However, citing *Zobel v. Williams*, 457 U.S. 55 (1982), *State Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 904 (1986) and *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623 (1985), the lower courts determined that

---

administration of public welfare assistance which does not penalize the right to travel, or any other fundamental right, should be subjected to a strict scrutiny analysis, those holdings should be re-examined.

the relevant penalty comparison is not between newcomers to California and residents of other states, but between newcomers and existing California residents. The lower courts have misapplied the previous statements of this Court.

This Court did not determine in those cases that the existence of a penalty is to be based on a comparison between newcomers and existing residents. Instead, that comparison was invoked in order to determine whether the state was distributing benefits unequally between newcomers and existing residents; i.e., whether the statute at issue could be challenged on equal protection grounds. When, as here, an unequal distribution of benefits is challenged on equal protection grounds, the analysis then shifts to the determination of the proper standard of review. If the statute impacts on a suspect class or penalizes a fundamental right, the statute must undergo a strict scrutiny analysis. Otherwise, as here, the statute must merely pass a rational basis test.

The lower courts, however, erred by analyzing the unequal distribution of benefits between newcomers and existing California residents as sufficient evidence of a penalty. To the contrary, the correct analysis is to determine whether or not a *newcomer* has suffered a detriment solely due to the exercise of the right to travel. This analysis can only be performed by comparing the positions of newcomers before and after travel.

When examining the question whether a penalty exists upon operation of a public assistance statute, this Court has compared the position of newcomers before and after travel to the state. In *Memorial Hospital*, to

ascertain the existence of a penalty, this Court analyzed whether a person afflicted with a certain ailment might consider a move to a state with no eligibility for non-emergency medical care for a certain period. *Memorial Hospital*, 415 U.S. at 257. Thus, in order to examine whether a penalty on travel existed, this Court examined the position of a person contemplating travel before and after that travel.

To compare (as did the lower courts) recent arrivals with existing California residents for the purpose of analyzing the existence of a penalty is to compare apples to oranges. As noted above, existing California residents are, by definition, not impacted by section 11450.03 since any decision to travel to California has already been made. Therefore, such a comparison does not involve questions of travel. Any comparison between newcomers and existing residents as to the effect of the statute relates solely to the difference in benefit levels. Controlling precedent of this Court demonstrates that questions as to benefit levels are determined by a rational basis analysis. *Dandridge*, 397 U.S. at 485.

Therefore, the proper comparison for an analysis of the existence of a penalty is between the positions of newcomers before and after travel to California. Because these newcomers are no worse off after travel to California as to the amount of cash aid receivable, there is no penalty on the right to travel and strict scrutiny is not triggered. Therefore, this Court should hold that the appropriate standard of review for section 11450.03 is the rational basis standard.

III

EVEN IF SECTION 11450.03 HAS AN IMPACT ON TRAVEL, THAT IMPACT IS REMOTE AND INCIDENTAL. THEREFORE, SECTION 11450.03 IS NOT SUBJECT TO STRICT SCRUTINY

The dissent by Chief Justice Rehnquist in *Memorial Hospital*, 415 U.S. at 281-283, notes that in *Williams v. Fears*, 179 U.S. 270 (1900), the Court upheld a Georgia statute taxing persons hiring labor for work outside the State of Georgia because it affected freedom of egress "only incidentally and remotely." Because there was a reasonable basis for the Georgia tax statute, it did not violate the Fourteenth Amendment to the United States Constitution. *Williams*, 179 U.S. at 275.

Chief Justice Rehnquist's dissent in *Memorial Hospital* also notes that until this Court's decision in *Shapiro*, the leading case involving the right to travel, *Edwards v. California*, 314 U.S. 160 (1941), invalidated a statute that clearly was specifically designed to deter indigent persons from entering California by subjecting to criminal penalties "any person 'that brings or assists in bringing into the State any indigent person.' " *Memorial Hospital*, 415 U.S. at 282. The statute at issue in *Edwards* was not an incidental or remote barrier to migration. To the contrary, it was a purposeful attempt to insulate the state from indigents and served as a significant barrier to interstate travel. Thus, cases prior to *Shapiro* demonstrate that statutes whose impact on travel is incidental and remote should be judged by traditional, rational basis, equal protection tests. To be judged by stricter, heightened scrutiny, statutes should do more than just "touch on" the right to travel. Strict scrutiny should be reserved for

statutes which impose a significant and severe penalty on travel. Were this not the case, the result in *Sosna v. Iowa*, 419 U.S. 393 (1975), would be inexplicable since this Court in *Sosna* permitted the State of Iowa to temporarily deprive newcomers of the right to file for divorce, notwithstanding the "touch" that state law had on interstate migration. This Court in *Sosna* made clear that merely touching on the right to travel is insufficient to trigger strict scrutiny. *Id.* at 406.

Therefore, the constitutionality of section 11450.03 should be judged by traditional, rational basis equal protection tests. Indeed, a rational basis analysis is the appropriate constitutional review for statutes involving the administration of public welfare assistance. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

In this case, the impact on travel of section 11450.03 is, at most, incidental and remote to the purpose of reducing state expenditures and aiding in welfare reform. As to their amount of cash aid, plaintiffs remain in a position no worse than that which they occupied before departing their state of former residence.[8] Section 11450.03 does not provide a penalty on the basic necessities of life, it does

[8] "In both 1980 and 1985 all but five of the states had a cost of living within ten percent of the national average . . . when all states are considered together, the variation in AFDC benefits is four times larger than the variation in the cost of living." Peterson, et al., *Welfare Magnets* (The Brookings Institute, 1990) p. 11. Thus, there is not a significant relationship between a state's cost of living and its welfare payments.

not render new residents of California ineligible for public assistance, and it does not prevent anyone from traveling to California. Plaintiffs receive no less than an amount of cash aid which was constitutionally permissible in their state of prior residence.[9]

To examine section 11450.03 in isolation is to ignore the full extent of California's welfare reform program. This program is more than just section 11450.03. It includes work incentives, increases in resource limits and other forms of cash and non-cash assistance. Moreover, for every three dollars a TANF cash aid grant is reduced by operation of the statute, Food Stamps are increased by approximately one dollar. See Declaration of Bruce Wagstaff. Pet.App. 38. In addition, all California TANF recipients (including new residents) may be entitled to a Special Needs Allowance, including an allowance for homeless assistance, *id.*, and persons subject to section 11450.03 remain eligible for full Medicaid benefits. *Id.* Therefore, the impact of section 11450.03 on a person's decision to travel to California must be examined in conjunction with all the other elements of California's public assistance program. Thus, if section 11450.03 is viewed as a penalty on travel, that penalty has only an

[9] It is constitutionally permissible both to establish a benefit level below the cost of living or the standard of need and to set benefits which will encourage gainful employment. It is also constitutionally permissible to disregard family size in setting benefit levels. *Dandridge v. Williams*, 397 U.S. 471, 480 (1970). Thus, to the extent that section 11450.03 operates as a reduction of benefits, section 11450.03 is constitutionally permissible.

incidental impact on the total package of benefits California offers.

Although plaintiffs have focused on the high cost of living in California, such considerations are irrelevant as there is no constitutionally required relationship between the cost of living or standard of need and the level of AFDC payments. Thus, the impact of section 11450.03 on the right to travel is significantly less than the impact of the statute at issue in *Shapiro*, which operated as a total denial of welfare assistance for a year. The impact of section 11450.03 is also much less than the impact on the right to travel of the statutes at issue in *Zobel v. Williams*, *State Attorney General of New York v. Soto-Lopez*, and *Hooper v. Bernalillo County Assessor*. In all of those cases, the statutes at issue created permanent classifications between existing residents and newcomers, which is not the case under section 11450.03. Because these cases are factually distinguishable from this case, this Court must hold that the lower courts apply a rational basis analysis to statutes such as section 11450.03, which have, at most, only a temporary and incidental effect on the right to travel.

CONCLUSION

This Court has the opportunity to allow the democratic processes of the California Legislature and the United States Congress to stand. The constitutionality of section 11450.03 may be upheld without overruling *Shapiro* and its progeny because plaintiffs' right to travel to California is not penalized by operation of the statute.

Instead, the statute merely sets the amount of cash aid which may be received by new California residents. This statute is clearly within the parameters of economic and social welfare legislation involving the administration of public welfare assistance. Clear precedent of this Court demonstrates that the constitutionality of such statutes should be examined under a rational basis analysis.

California is not asking this Court to decide whether the statute is the best way to allocate public resources. That decision has already been made by the Legislature and by Congress. As noted by this Court,

> . . . the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

Dandridge at 487. Additionally, state measures such as section 11450.03 are the *precise* result Congress contemplated and approved when authorizing states to adopt durational residency requirements[10] which are among those federal welfare reform measures which

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[10] The legislative history of PRWORA demonstrates that Congress was aware of the issues involved in the ongoing challenges to the implementation of durational residency requirements by the states. "The U.S. Supreme Court has invalidated some State laws that withheld aid from persons who had not resided there for at least 1 year. It has not ruled on the question of paying lower amounts of aid for incoming residents." H.R. Rep. No. 104-651, at 1337 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2396.

> grant[] maximum State flexibility to show true compassion by helping those in need achieve the freedom of self-reliance.

H.R. Rep. No. 104-651, at 1 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2184.

Instead, the question here is the appropriate standard of review for a statute involving the administration of public welfare assistance. Because the impact of section 11450.03 is limited to a temporary setting of cash aid amounts, it does not implicate or penalize the right to travel sufficiently to trigger strict scrutiny. Therefore, rational basis review is the appropriate standard. Accordingly, this Court should reverse the judgment of the Ninth Circuit and remand this action with instructions to dissolve the preliminary injunction.

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ELOISE ANDERSON, et al.,

Petitioners,

v.

BRENDA ROE and ANNA DOE,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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QUESTIONS PRESENTED

1. Whether a state statute that discriminates against newcomer state citizens so as to deny them the same level of public assistance as that received by other state citizens, based solely on their recent arrival and states of prior residence, violates the Equal Protection Clause, Citizenship Clause, and Privileges or Immunities Clause of the Fourteenth Amendment, the Privileges and Immunities Clause of Article IV, and the logic and structure of our constitutional scheme?

2. Whether a state statute enacted principally for the purpose of deterring needy families from migrating to and settling in the state is constitutionally permissible?

3. Whether Congress may authorize a state statute that discriminates against newcomer state citizens based on their length of residency and states of prior residence, and that has the purpose of deterring needy families from migrating to and settling in the state?

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STATEMENT OF THE CASE

A. The California Statute

The California durational residency statute, Welfare and Institutions Code §11450.03, facially discriminates against newcomer residents by restricting their maximum CalWORKs assistance to the level of their prior state of residence.[1] Section 11450.03 is the same statutory provision invalidated in *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993), *aff'd*, 26 F.3d 95 (9th Cir. 1994), *vacated as unripe sub nom., Anderson v. Green*, 513 U.S. 557 (1995). The statute mandates that eligible families who have resided in the state for less than twelve consecutive months immediately before applying cannot receive CalWORKs assistance any higher than "the maximum aid payment that would have been received by that family from the state of prior residence." Cal. Welf. & Inst. Code §11450.03(a).

Under this statute, Californians who have resided in the state for at least one year receive CalWORKs assistance at the level the State of California has deemed appropriate to their subsistence requirements. In contrast, Californians who have lived in the state for less than one year – even though no less bona fide California residents – are limited to the lesser assistance levels they would have received in

---

[1] CalWORKs is the program adopted by the California Legislature, Cal. Welf. & Inst. Code §11200 *et seq.*, after Congress' replacement of Aid to Families with Dependent Children ("AFDC") with a new program named Temporary Assistance to Needy Families ("TANF"), under the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"). The PRWORA amended the Social Security Act, 42 U.S.C. §601 *et seq.*, to replace AFDC with TANF and require each state to submit a TANF plan. CalWORKs is both work-based and time-limited, requiring participation in work activities while receiving aid, Cal. Welf. & Inst. Code §11320.1, and discontinuing aid after 60 months. *Id.*, §11320.15.

Oklahoma, Mississippi, or whatever other state from which they moved, if that state's assistance level is lower.[2]

The California law thus creates a multi-tiered benefits scheme, under which many families that have migrated from other states within the past year will receive a small fraction – as little as 21% – of that received by otherwise identical families. J.A. 26, 75. For example, while the maximum aid for a family of four in California is $673 (J.A. 75), a family of four that has moved from Mississippi to California within the past year would receive only $144 per month (J.A. 26), regardless of whether that family could survive at that level in California, which has one of the highest costs of living in the United States. J.A. 91-97.

Although the impact on families is large, the impact on the State's public assistance budget is minuscule. By the State's own estimate, the cost savings from section 11450.03 amount to 0.38% of the total AFDC budget.[3] The State's own estimate also reveals that **less than one percent** of families receiving benefits at any given time have migrated from another state within the past year

[2] Newcomer families from states with assistance levels lower than California's thus receive the lower amount of the states from which they came, while newcomer families from states with higher assistance levels receive benefits at the lower California levels. Newcomer families from foreign countries receive assistance at the same levels as California residents who have lived in the state for a year or longer. *Roe v. Anderson*, 966 F. Supp. 977, 980 (E.D. Cal. 1997), *aff'd*, 134 F.3d 1400 (9th Cir. 1998).

[3] According to the State Deputy Director of the Welfare Programs Division ("WPD"), the cost savings to California's AFDC program arising from section 11450.03 are only $22.8 million, out of a total AFDC budget of $6 billion. Pet. App. 36-37.

– and the percentage who have migrated from states with **lower** welfare benefits is necessarily even less than that.[4]

California's durational residency requirement applies without regard to a family's actual reason for migrating to California. It makes no difference to the calculation of assistance levels whether the recipient is, for example:

- a mother returning to California with her small children to escape domestic violence in Louisiana or Oklahoma, as was the case of plaintiffs in *Green*, 811 F. Supp. at 517: *see also* J.A. 100-05, 145-49,
- a single parent who has never before received public assistance, who moved to California to take a new job within the past year and then,

[4] While the State Deputy Director of the WPD estimates that approximately 9100 families receiving aid as of October 1995 had resided in another state within the past year, Pet. App. 37, his declaration conspicuously omits any estimate of the **total** number of families receiving aid. However, the total number of families receiving aid as of July 1996 was 952,351. J.A. 75. Accordingly, less than 1% of all families receiving aid had migrated to California during the past year – and an even smaller proportion would be affected by § 11450.03, which only affects families migrating from states with **lower** benefit levels.

Although the State had, in 1992, estimated that "[a]pproximately 7% (50,000 cases) of California's AFDC caseload lived in another state within the previous twelve months prior to their application for aid in this State," J.A. 48, this figure does **not** purport to estimate the percentage of the caseload actually affected by § 11450.03 at any given time. In particular, the 7% estimate appears to include every family that resided out of state in the 12 months "**prior to their application**" for aid, rather than those who had resided in the State during the 12 months prior to the 1992 survey. Thus, while 7% of the entire caseload may have resided out of state at some point during the 12 months prior to their applying for aid, a far smaller percentage are affected by §11450.03 at any particular time. In addition, the 7% estimate includes people who came from states with higher benefits than California's, and would therefore be eligible for the full California benefit.

at any time within the twelve months, lost that job due to a plant closure or other unforeseen circumstance, or

- a member of a family, like that of the named plaintiffs in this case, that migrates to California in search of employment without knowing a thing about CalWORKS or TANF, and is forced to apply for assistance when not immediately able to find work.

Under the Ninth Circuit's decision in *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994), California had been prevented from implementing its durational residency scheme. After enactment of the 1996 federal welfare law, 42 U.S.C. §604(c), and without any further action on the part of the state legislature, state officials decided to proceed anew with implementation of section 11450.03. In February 1997, California directed counties to implement section 11450.03 effective April 1997. J.A. 20-25.

1. The Purpose of the Statute

Based on the plain language of the law, its legislative history, and Petitioners' own representations, the district court and the court of appeals both concluded that "the apparent purpose of §11450.03 was to deter migration of poor people to California." *Roe v. Anderson*, 134 F.3d 1400, 1404 (9th Cir. 1998); *see Green*, 811 F. Supp. at 522 n.14. As the court of appeals noted: "At oral argument . . . , in response to the suggestion that the purpose of §11450.03 is to keep poor people out of the state, the state conceded that it does not want people to move to California 'with a mind-set of economic dependency.' " 134 F.3d at 1404; *see also Beno v. Shalala*, 30 F.3d at 1061 (stating that section 11450.03's residency requirement "aims to discourage poor families from moving to California").

a. Legislative history

The statute has its origins in a ballot initiative, Proposition 165, first introduced by Governor Pete Wilson on December 10, 1991. This measure contained language virtually identical to that ultimately enacted as Welfare and Institutions Code §11450.03, limiting "families who have resided in this state for less than twelve (12) months . . . [to] an amount . . . not to exceed the maximum aid payment that could have been received from the state of prior residence." J.A. 19.[5] Proponents of the measure described its objective as to "**STOP** out of state welfare recipients from moving to California just to increase their grants." J.A. 28 (emphasis in original).

Campaign materials favoring the ballot measure proclaimed the same purpose. For example, a widely distributed "fact sheet" stated that the proposition "*LIMITS WELFARE PAYMENTS TO NEWCOMERS* – To reduce any incentive to come to California solely for higher welfare benefits." J.A. 31. In the official ballot argument on behalf of the measure, Governor Wilson articulated as the initiative's selling point that "people move to California to collect welfare," and that "[n]ew state residents would receive no more in welfare here than in their home state, to end California's status as a welfare magnet." J.A. 34.

At the same time that the Governor sought voter approval for the initiative, he promoted identical legislation. The State Legislative Analyst's report on the measure stated that "[t]he concern driving these policy proposals is that people receiving assistance in low-benefit states are encouraged to move to high-benefit states in order to take advantage of the higher benefit." J.A. 51. Both opponents

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[5] The legislative history of predecessor bills is appropriately considered to ascertain the legislative intent of a subsequent enactment. *See Estate of Cowart v. Nicholas Drilling*, 505 U.S. 469, 478 (1992).

and proponents of the legislation emphasized this purpose throughout the legislative debate.[6] Although the ballot initiative was defeated at the polls, its legislative counterpart was subsequently adopted and signed by the Governor on September 14, 1992. Cal. Stats. 1992, Ch. 10 West's Cal. Leg. Serv. 2897 (1992).

b. The federal waiver application

The Secretary for the California Health and Welfare Agency requested then-required waivers from the federal government for both Proposition 165 and the companion legislation. J.A. 43-49. The waiver request letters for each expressly identified the sole objective of the residency requirement as "reduc[ing] the incentive for families to migrate to California for the purpose of obtaining higher aid payments." *Green*, 811 F. Supp. at 522 n.14; J.A. 45.

While the State now claims cost-savings as its rationale for imposing the durational residency requirement, the undisputed record showed that California could have accomplished exactly the same claimed savings simply by

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[6] *See, e.g.*, J.A. 64 (remarks of Assemblyman Bates):

> This Bill sends a message that says if you're poor, [you're] down trodden, California doesn't want you. We don't want you to come here, we want you to go someplace else, the land of opportunity is not a land of opportunity for people who are poor.

J.A. 71 (remarks of Assemblyman Gotch):

> It's certainly debateable [sic] whether the westward migration is in fact fueled by California as a welfare magnet. I doubt that's the case but none the less the passage of this Bill would certainly lay to rest that question and I would urge an aye vote on the Bill before us today.

See also Green J.A. 93 (statement by Petitioner Anderson, Director of Department of Social Services, that intent of the statute was to "discourag[e] people from coming to California just for higher benefits").

reducing benefits across-the-board by but 72 cents per recipient per month. Pet. App. 36-37 ($22.8 million divided by 12 months, divided by 2,645,814 recipients); *see also Roe*, 966 F. Supp. at 985 (finding that "the State may save a comparable amount of money by a very minor reduction in the benefits paid to all AFDC recipients").

2. The Impact of the Statute

a. Plaintiffs

The named plaintiffs in this litigation each moved to California for reasons entirely unrelated to the receipt of welfare benefits; rather, each moved to pursue employment. *Roe*, 966 F. Supp. at 980. Brenda Roe, pregnant with her first child at the time of the preliminary injunction, had never previously sought public assistance in any state. She lacked any awareness of CalWORKS, TANF or AFDC when she and her husband decided to leave Oklahoma and settle in California. J.A. 106. The median monthly average rents in Long Beach, California, where she resides, are $300 for a studio apartment and $450 to $650 for a one-bedroom apartment. J.A. 108. She was informed by the State Social Services office that she would be limited to the Oklahoma monthly grant level of $307, as compared to the California grant level of $565 for a family of three. *Id.*; *Roe*, 966 F. Supp. at 980. "Both of the named plaintiffs have been unable to locate housing in California that they could afford on the reduced grant." *Id.* at 985.

b. Effect on new Californians

The undisputed evidence showed that "although in absolute terms California benefit levels rank as the sixth highest grant level in the United States," "when housing costs are factored in, California benefit payments rank 18th in the nation." *Roe*, 966 F. Supp. at 981. The district court noted that "defendants do not disagree with plaintiffs' contention that there will be disparities, even significant disparities, among California AFDC recipients as between

newcomers and recipients who have resided in the state for one year." *Id.* at 982-83.

Indeed, the State did not contest expert testimony that in nearly all cases the amount that newcomers would receive falls far short of what is required to subsist – or even to pay rent – in California. J.A. 91-97. In all but two of the states where the maximum aid payment is lower than California's, the cost of living is also below that of California, in many cases well below. *Roe*, 966 F. Supp. at 981 n.10, *see also* J.A. 94. There are 15 states in which the maximum benefit for a family of three was less than half the fair market rent for even a one-bedroom apartment in California. *Roe*, 966 F. Supp. at 981 n.10. And, to compound these disparities, California recipients are far less likely to receive governmental housing assistance than are recipients in other states. In 1995, for instance, only 9% of California AFDC families received governmental housing assistance, less than half the national average. J.A. 94.

The State submitted no evidence in support of its "welfare magnet" hypothesis. Instead, all of the evidence before the district court demonstrated that "persons do not move from state to state to seek higher AFDC benefits." *Roe*, 966 F. Supp. at 982. The uncontroverted record showed, for example, that "non AFDC-eligible people were more likely to move to higher benefit states than AFDC-eligible people," and that "when the indigent relocate, they have *no greater propensity* to consume welfare benefits than the poor who are already within a state's borders." *Id.* (original emphasis).[7] The State's own Legislative Analyst has acknowledged that available evidence indicates that "there are many reasons for moving" and

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[7] The district court relied in part on a recent study finding "that only 3.8 percent of the AFDC-eligible population moved from one state to another, and only 1.8 percent moved from a state offering lower to a state offer[ing] higher AFDC benefits. In contrast, out of AFDC non-eligible people, 6.8 percent moved to a different state, 3.4 percent from a lower to a higher benefit state." *Id.* at 982 n.13 (brackets in original).

that "reduced grants for new arrivals may not appreciably reduce migration for those families and individuals that end up on public assistance." J.A. 60-61.

B. Proceedings Below

The district court granted a preliminary injunction against enforcement of the durational residency statute, holding that it impermissibly impaired the fundamental constitutional right of interstate migration and, alternatively, that it irrationally discriminated based on length of California residency in violation of the Equal Protection Clause. *Roe*, 966 F. Supp. at 983-85 (adopting analysis of "Supreme Court's right of migration and equal protection cases" set forth in *Green*, 811 F. Supp. 516). The court of appeals affirmed the preliminary injunction, concluding that the district court did not err in its determination that Plaintiffs had demonstrated a probability of success on the merits. *Roe*, 134 F.3d at 1404 (citing *Green*, 26 F.3d 95, 96 (9th Cir. 1994)). In particular, the court of appeals reaffirmed that the durational residency requirement violated the Equal Protection Clause by drawing "distinctions . . . among residents of a state . . . based on the incipiency or duration of their residency." 134 F.3d at 1404. The court of appeals also upheld the district court's determination that this durational residency requirement was predicated upon the impermissible purpose of "deter[ring] migration of poor people to California." *Id.*

SUMMARY OF ARGUMENT

One of the cornerstones of our constitutional structure is the principle of free interstate migration, under which United States citizens may become citizens of their state of choice by establishing residence therein, and may thereby enjoy the same rights as other citizens of that state. This Court has consistently reaffirmed that this principle forbids not only "actual barriers to interstate migration" but also " 'being treated differently' " on account of one's recent migration from another state. *Bray v. Alexandria*

Women's Health Clinic, 506 U.S. 263, 277 (1993) (quoting *Zobel v. Williams*, 457 U.S. 55, 60 n.6 (1982)). While states are free to implement rules designed to determine whether new arrivals are indeed bona fide residents who "inten[d] to remain in the State," *Sosna v. Iowa*, 419 U.S. 393, 407 (1975), they may not deny newcomers who **are** bona fide residents the full benefits of state citizenship. Nor may states enact laws with the purpose of discouraging people from migrating in. Whatever the State's authority to select its policies, it may not select its citizens. These precepts stem not just from the Equal Protection Clause, but also from the Citizenship Clause and Privileges or Immunities Clause of the Fourteenth Amendment, from the Privileges and Immunities Clause of Article IV, and from the "logic and structure of the constitutional scheme." *Nevada v. Hall*, 440 U.S. 410, 441 n.6 (1979) (Rehnquist, J., dissenting).

The State law at issue in this case, California Welfare and Institutions Code §11450.03, creates a multi-tiered benefits scheme that denies bona fide California residents eligibility for full public assistance on account of their recent arrival, and treats them as if they were still citizens of their prior states of residence. This law violates both the prohibition against **facial** discrimination against new state citizens and the prohibition against laws drawn with the **purpose** of discouraging migration into the state.

While section 11450.03 is subject to strict scrutiny, this Court need not reach the question of what level of scrutiny applies, since the California statute is not rationally related to any legitimate objective. The State does not even pretend that the measure is designed to determine bona fide California residency, nor could it plausibly do so since it unquestionably applies to those who **are** California citizens with the intent to remain in the state. To the extent that the law "intends to deter settlement into the state of persons who need welfare and seek a higher benefit," it has an "unconstitutional purpose." *Green v. Anderson*, 811 F. Supp. 516, 522 (E.D.Cal. 1993). On the other hand, to the extent that its purpose is to save costs, as the State now claims, the measure lacks any "rational design." *Id.* at

522-23. First, it disadvantages all eligible newcomer citizens notwithstanding that they are no better able to withstand any reduction in benefits than longer term residents. Second, it applies to all newcomers, even those who have settled in California for reasons totally unrelated to public assistance. Third, it does not simply create "two classes of needy resident families," *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969), but further subdivides new Californians like state flags into forty-four separate categories based solely on the state in which they previously resided. Finally, the miniscule costs to be saved by the measure, even by the State's own estimate, confirm that it is hostility toward outsiders – not legitimate fiscal objectives – that drives the measure.

Nothing in the subsequently enacted federal statute, 42 U.S.C. §604(c), alters the unconstitutionality of California Welfare & Institutions Code §11450.03. As an initial matter, the purposes underlying the federal statute are irrelevant, in view of the California statute's purpose – repeatedly trumpeted by Petitioners – to deter people from settling in California. Moreover, contrary to the United States' argument, the purposes claimed to underlie the federal statute are not adequate under any level of scrutiny. In any event, Congress may not authorize or otherwise sanctify a discriminatory state law that infringes on the right of United States citizens to settle in whatever state they choose, with the "same rights" as other citizens of that state.

ARGUMENT

I. The Principle of Free Interstate Migration Prohibits Discrimination Against New State Citizens, As Well As Actual Barriers to Interstate Travel

A. The Structural Objectives of the Constitution Require That United States Citizens Be Free to Choose Their State of Residence and That State Citizens Be Treated Equally Regardless of Length of Residency

The objective of political unification uniquely structures our Constitution. As this Court has long held, the Constitution was "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 523 (1935) (Cardozo, J.). As most recently reiterated by Justice Kennedy: "It must be recognized that ' "[f]or all the great purposes for which the Federal government was formed, we are one people, with one common country." ' " *United States Term Limits v. Thornton*, 514 U.S. 779, 840 (1995) (Kennedy, J., concurring) (quoting *Shapiro*, 394 U.S. at 630, quoting *The Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting)).

The principle of free interstate migration, and the concomitant right of United States citizens to settle in whatever state they choose, are necessarily bound together with this structural aim. As this Court has observed: "The federalist structure of joint sovereigns preserves to the people numerous advantages," including "mak[ing] government more responsive by putting the States in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).[8] The right freely to migrate from one state

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[8] *See also Zobel*, 457 U.S. at 67-68 (1982) (Brennan, J., concurring):

> A State clearly may undertake to enhance the advantages of industry, economy, and resources that make it a desirable place in which to live. In addition, a State may make residence within its boundaries more attractive by offering direct benefits to its citizens in the form of public services, lower taxes than other States offer, or direct distributions of its munificence. Through these means, one State may attract citizens of other States to join the numbers of its citizenry. That is a healthy form of rivalry: It inheres in the very idea of maintaining the States as independent sovereigns within a larger framework, and it is fully – indeed, necessarily – consistent with the Framers' further idea of joining these independent sovereigns into a single Nation.

to another therefore "occupies a position fundamental to the concept of our Federal Union" and "has long been recognized as a basic right under the Constitution." *United States v. Guest*, 383 U.S. 745, 757-58 (1966); *see id.* at 758 ("a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created"). It has received this Court's "unquestioned historic acceptance," regarded as a right that may be "inferred from the federal structure of government adopted by our Constitution." *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986) (plurality); *see also id.* at 903 ("Whatever its origin, the right to migrate is firmly established and has been repeatedly recognized by our cases.").[9]

Even before the Civil War Amendments, this Court viewed the right of United States citizens to settle in the state of their choice to be implicit in the structure of the

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[9] *See also Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 48-49 (1867); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); *Edwards v. California*, 314 U.S. 160, 173-74 (1941); *Shapiro*, 394 U.S. at 629-31, 634; *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254 (1974); *Zobel*, 457 U.S. at 60 n.6.

Constitution.[10] The Framers of the Constitution understood this right to be essential to the federal republic they were creating.[11] Tracing early opinions by Justices of this Court, Justice O'Connor's *Zobel* concurrence located the foundation of the " 'right of a citizen of one state . . . to reside in any other state,' " in Article IV's Privileges and Immunities Clause. 457 U.S. at 80 (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C. E.D. Pa. 1823)):

> It is difficult to imagine a right more essential to the Nation as a whole than the right to establish residence in a new State. Just as our federal system permits the States to experiment with different social and economic programs, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), it allows the individual to settle in the State offering those programs best tailored to his or her tastes.

Zobel, 457 U.S. at 76-77.

As this Court has long held, and most recently reiterated in *Bray*, these structural precepts mandate that new arrivals to a state be protected "against **two** sets of burdens: [1] 'the erection of actual barriers to interstate migration' and [2] 'being treated differently' from intrastate travelers." 506 U.S. at 277 (quoting *Zobel*, 457 U.S. at 60

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[10] In *Crandall*, for example, the Court struck down a state tax on passenger exit, eschewing reliance upon the dormant commerce clause and acknowledging that "no express provision of the Constitution" addressed the problem. 73 U.S. at 48. As Justice Rehnquist pointed out in *Nevada v. Hall*, the *Crandall* decision "appealed to the logic and structure of the constitutional scheme," a basis of the decision being that the law "is incompatible with the concept of one Nation." 440 U.S. 410, 441 & n.6 (1979) (dissenting opinion). Justice Rehnquist's *Nevada v. Hall* dissent expressed concern about a result that would "induce some 'Balkanization' in state relationships." *Id.* at 443.

[11] As Hamilton wrote: "It may be esteemed the basis of the Union that the 'citizens of each state shall be entitled to all the privileges and immunities of citizens of the several States.' " *The Federalist* No. 80, at 478 (Hamilton) (C. Rossiter ed. 1961).

n.6) (emphasis added); *see also Soto-Lopez*, 476 U.S. at 904 ("right to migrate protects residents of a State from being disadvantaged, or from being treated differently, simply because of the timing of their migration"); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 n.6 (1985); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 261 (1974); *Shapiro*, 394 U.S. at 629-32. As far back as *The Slaughter-House Cases*, this Court held that: "[A] citizen of the United States can by his own volition become a citizen of any state of the Union by a bona fide residence therein with the **same rights** as other citizens of that state." 83 U.S. (16 Wall.) 36, 80 (1873) (emphasis added).[12] This requirement of nondiscriminatory treatment is grounded in the recognition that:

> The State may not favor established residents over new residents based on the view that the State may take care of "its own," if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, **become the State's "own" and may not be discriminated against solely on the basis of their [recent] arrival in the State.**

Hooper, 472 U.S. at 623 (emphasis added). As Justice Kennedy has explained, the Constitution is "unprecedented in its form and design" in that it establishes that each state government, as well as the federal government, has "its own direct relationship" with and "its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Term Limits*, 514 U.S. at 838 (Kennedy, J., concurring). Among the "obligations" that the Constitution thereby imposes on the states is that they may not discriminate against some of the "people who

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[12] *See also Slaughter-House Cases*, 83 U.S. at 112-13 (Bradley, J., dissenting) ("A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen.").

sustain it and are governed by it" based on the duration of their residency in the state.

To be sure, none of these cases foreclose states from adopting rules denying their benefits to those who are **not** bona fide residents and do not intend to remain in the state. A state university, for example, may enforce a tuition scheme allowing "bona fide [state] residents" to pay lower tuition rates, so as to prevent out-of-state residents who come to the state solely for an education from "tak[ing] advantage of the in-state rates" with no intent to remain there. *See Vlandis v. Kline*, 412 U.S. 441, 453-54 (1973); *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971). Likewise, a state may limit the availability of its divorce decrees to bona fide residents, to ensure that it does not become a "divorce mill" for those who have "long resided elsewhere" and have not shown their "inten[t] to remain in the State." *Sosna*, 419 U.S. at 407; *see also Zobel*, 457 U.S. at 78 n.8 (O'Connor, J., concurring) (noting that "[i]n *Sosna*, the State showed that nonresidents were a peculiar source of the evil addressed" because they "could misrepresent their attachment to Iowa and obtain divorces that would be susceptible to collateral attack in other States.").

Upon establishing bona fide residence, however, an individual becomes a state citizen on equal footing with every other state citizen, regardless of duration of his or her residency. New state citizens may not be treated as if they were still citizens of their former state of residency, or otherwise accorded less favorable treatment on account of their more recent arrival.[13]

In addition to being embedded in the structure of the Constitution, the principle of equal treatment for new

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[13] The fact that the Constitution does not recognize dual state citizenship magnifies the importance of treating all bona fide state residents, including those who have recently settled, as full-fledged state citizens.

arrivals is built into three different clauses of the Fourteenth Amendment. First, as this Court repeatedly has recognized, this principle is "a particular application of equal protection analysis." *Zobel*, 457 U.S. at 60 n.6; *see also Memorial Hospital*, 415 U.S. at 251 (identifying "constitutional question presented" as "whether this durational residency requirement is repugnant to the Equal Protection Clause"). Second, it is reflected in and reinforced by the Citizenship Clause of the Fourteenth Amendment, which provides that "[a]ll persons born or naturalized in the United States. . . . are citizens of the United States **and of the state wherein they reside**" (emphasis added). Under this clause, neither the federal government nor state governments may enact laws negating a United States citizen's choice of state residency, by classifying newcomers based on how long they have resided in a state so as to make them anything less than full-fledged citizens or in any other manner.[14] Finally, the principle finds expression in the Fourteenth Amendment's Privileges or Immunities Clause, which guarantees that "a citizen of the United States can of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State." *Slaughter-House Cases*, 83 U.S. at 80.

B. This Court Has Consistently Struck Down State Laws According Less Favorable Treatment to Bona Fide State Citizens Based on Their Length of Residency

Neither the State nor any amicus questions the interconnection between the objective of political unification and the principle prohibiting discrimination against bona

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[14] *Hooper*, 472 U.S. at 623 n.14 ("[T]he Citizenship Clause of the Fourteenth Amendment 'does not provide for, and does not allow for, degrees of citizenship based on length of residence.' ") (citation omitted); William Cohen, "Discrimination Against New States Citizens: An Update," 11 *Const. Comm.* 73, 74, 78-79 (1994).

fide state residents based on their length of residency. As the United States properly recognizes, the principle of free interstate migration is rooted in "the nature of a national Union, as opposed to a federation of independent states." U.S. Amicus Br. at 23. While this Court has identified its textual source in several provisions of the Constitution,[15] the analysis has focused on whether new state residents are treated less favorably than other state residents: "Right to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents." *Zobel*, 457 U.S. at 60 n.6 (citing cases); *see also Bray*, 506 U.S. at 277 (quoting *Zobel*).[16]

Thus, for example, the Court in *Shapiro* struck down a one-year durational residency requirement for receipt of welfare benefits as "a classification which constitutes an

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[15] For example, the freedom of interstate travel or migration has been rooted in the Privileges and Immunities Clause of Article IV, *see, e.g., Zobel*, 457 U.S. at 73-74 (O'Connor, J., concurring in judgment) (privileges and immunities analysis "supplies a needed foundation for many of the 'right to travel' claims discussed in the Court's prior opinions"); *Paul v. Virginia*, 75 U.S. at 180 ("[W]ithout some provision of the kind . . . the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists."); in the Commerce Clause, *see Edwards v. California*, 314 U.S. at 172-74; in the Privileges or Immunities Clause of the Fourteenth Amendment, *see id.* at 178-79 (Douglas, J., concurring); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908); and in the Fifth Amendment Due Process Clause, *see Kent v. Dulles*, 357 U.S. 116, 125-126 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment. . . . [T]hat right was emerging at least as early as the Magna Carta. . . . Freedom of movement across frontiers . . . , and inside frontiers as well, was a part of our heritage. . . . Freedom of movement is basic in our scheme of values.").

[16] *See also Soto-Lopez*, 476 U.S at 904 n.4 (stating that "the standard of review is the same" "regardless of the label we place on our analysis – right to migrate or equal protection. . . . ").

invidious discrimination denying [new residents] equal protection of the laws." 394 U.S. at 627. *Shapiro*'s starting point was that "the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited. . . . " 394 U.S. at 629. The Court held that "any classification which serves to penalize the exercise of th[e] right, unless shown to be necessary to promote a **compelling** governmental interest, is unconstitutional." *Id.* at 634 (emphasis in original).

Under this exacting standard, this Court has without exception struck down state laws according newcomers less favorable treatment with respect to public benefits that support the "basic necessit[ies] of life." *Memorial Hospital*, 415 U.S. at 259; *Shapiro*, 394 U.S. at 627; *see also Dunn v. Blumstein*, 405 U.S. at 342 (invalidating one-year residency requirement for voting). In *Memorial Hospital*, for example, the Court invalidated state denial of publicly funded non-emergency medical care to residents who had not yet lived for a year within the state, holding that the Constitution guarantees "new residents **the same right** to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents." 415 U.S. at 261 (emphasis added).[17]

In *Shapiro*, *Memorial Hospital*, and *Dunn*, the Court applied strict scrutiny to void classifications disadvantaging newcomers based on the timing of their migration as impermissible "penalties" on their having exercised the right of interstate migration. In none of these cases did this Court insist upon actual proof that interstate travel had in

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[17] *See Memorial Hospital*, 415 U.S. at 259 ("[G]overnment privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements.") (listing cases); *id.* at 285 (Rehnquist, J., dissenting) (there is "virtual denial of entry inherent in denial of welfare benefits – the 'very means by which to live.' ") (quoting *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970)).

fact been impaired or deterred. *See, e.g., Dunn*, 405 U.S. at 340 (noting that right to travel analysis does not rest on "presence of actual deterrence"). In *Dunn*, for example, the Court expressly held strict scrutiny to be the proper standard because the state's "durational residence laws classify bona fide residents on the basis of recent travel, penalizing those persons, and only those persons, who have gone from one jurisdiction to another during the qualifying period." *Id.* at 338. As this Court has recently clarified, these holdings are grounded in the recognition that the Constitution's political unification objectives do not just prohibit "actual barriers to interstate movement." *Bray*, 506 U.S. at 277 (quoting *Zobel*, 457 U.S. at 60 n.6). In each of these cases, the pivotal question was whether new residents were "**treated differently** from longer term residents" on account of their recent migration from another state. *Zobel*, 457 U.S. at 60 n.6 (citing *Memorial Hospital*, *Dunn*, and *Shapiro*) (emphasis added); *see also Bray*, 506 U.S. at 276-77 (right to travel prohibits " 'being treated differently' from intrastate travelers").

In other cases, this Court has struck down state schemes that make public benefits dependent upon the recency of one's taking up residency, without even having to reach the issue whether heightened scrutiny applies.[18] In *Zobel*, for example, the Court invalidated as irrational an Alaska statute that distributed income from natural resource development to state residents based upon when they had established residency in the state:

> If the states can make the amount of a cash dividend depend on length of residence, what would preclude varying university tuition on a sliding scale based on years of residence – or even limiting access to finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? Could states impose different taxes based on length of residence? Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency.

Id. at 64 (footnote omitted). The Court quoted from Chief Justice Taney's dissent in *The Passenger Cases*, 48 U.S. (7 How.) at 492, that " '[s]uch a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it.' " 457 U.S. at 64 n.12.[19]

Justice O'Connor concurred in the judgment, concluding that "Alaska's distribution plan distinguishes between long-term residents and recent arrivals," and that "[t]he Privileges and Immunities Clause of Article IV. . . . addresses just this type of discrimination." *Id.* at 73. As Justice O'Connor pointed out, "[s]tripped to its essentials, the plan denies non-Alaskans settling in the State the same privileges afforded longer term residents," *id.*, in direct contravention of the Constitution's political unification objective: "This inequality, as the Court repeatedly has recognized, conflicts with the constitutional purpose of maintaining a Union rather than a mere 'league of States.' " *Id.* (citing *Paul v. Virginia*, 75 U.S. at 180).

Other cases have applied rational basis review to strike down state laws discriminating based on length of state residency without having to reach the question

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[18] The Court in *Shapiro*, though applying strict scrutiny, made clear that the statutes reviewed would likely fail rational basis analysis as well: "[E]ven under the traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional." 394 U.S. at 638 (footnote omitted).

[19] *See also Zobel*, 457 U.S. at 66, 67 (Brennan, J., concurring) ("[T]he federal interest in free interstate migration . . . is clearly, though indirectly, affected by the Alaska dividend-distribution law, . . . provid[ing] an independent rationale for holding that law unconstitutional. . . . A scheme of the sort adopted by Alaska is inconsistent with the federal structure even in its prospective operation.").

whether heightened scrutiny applies. In *Hooper*, the Court struck down as irrational a New Mexico law granting a tax exemption to Vietnam veterans only if they had resided in the state before a specified date. 472 U.S. at 623. One year after *Hooper*, this Court invalidated on rational basis grounds a New York state law, which afforded a civil service preference to veterans who had resided in New York at the time they entered the military, but not to those who had resided outside New York when they entered the armed services. *Soto-Lopez*, 476 U.S. at 911. Significantly, the dissent of Justices O'Connor, Rehnquist and Stevens distinguished *Zobel* by defining the "penalty" analysis as asking whether **newcomers** were treated less favorably than longer term residents: "[T]he New York scheme does not effectively penalize those who exercise their fundamental right to settle in the State of their choice by requiring newcomers to accept a status inferior to that of all oldtime residents of New York upon their arrival." *Id.* at 922 (O'Connor, J., dissenting).

II. The California Statute Impermissibly Discriminates Against State Citizens Based On Their Length of Residence and Has the Impermissible Purpose Of Discouraging Migration Into California

California's durational residency statute is antithetical to the fundamental structural principle of national unity, which mandates that a State not treat its new citizens less favorably on account of the timing of their migration or make laws designed to deter migration into the state. As every lower court to date has concluded, regardless of the level of scrutiny applied,[20] there is no

[20] *See, e.g., Maldonado v. Houstoun*, 157 F.3d 179 (3d Cir. 1998) (affirming on other grounds, *Maldonado v. Houstoun*, 177 F.R.D. 311 (E.D. Pa. 1997)); *Warrick v. Snider*, 2 F. Supp. 2d 720 (W.D. Pa. 1997) (holding 60-day residency requirement unconstitutional); *Westenfelder v. Ferguson*, 998 F. Supp. 146 (D.R.I. 1998) (order granting preliminary injunction), *appeal docketed*, No. 98-1431 (1st Cir. May 14, 1998); *Hicks v. Peters*, 10 F. Supp. 2d 1003 (N.D. Ill. 1998) (permanently enjoining 12-month durational residency requirement); *Ruffin v. Quasion*, No. C97-5767 FDB (W.D. Wa. Feb. 6, 1998) (order granting preliminary injunction); *Mitchell v. Steffen*, 504 N.W. 2d 198, 203 (Minn. 1993), *cert. denied*, 510 U.S. 1080 (1994) (holding six-month residency requirement "unconstitutional under the equal protection clause"); *Sanchez v. Department of Human Services*, 713 A.2d 1056 (N.J. Super. Ct. App. Div. 1998) (granting injunction); *Aumick v. Bane*, 612 N.Y.S. 2d 766 (N.Y. Sup. Ct. 1994) (permanently enjoining six-month residency requirement); *Brown v. Wing*, 663 N.Y.S. 2d 1025 (N.Y. App. Div. 4 Dep't 1997) (affirming permanent injunction against six-month residency requirement in 649 N.Y.S. 2d 988 (N.Y. Sup. Ct. 1996)); *Doe v. Wing*, No. 98/2903 (N.Y. Sup. Ct. July 30, 1998) (holding one-year residency requirement unconstitutional).

adequate justification for a state law that affords lesser public assistance benefits to bona fide state citizens who have resided in the state for less than one year.[21]

A. The California Statute Facially Discriminates Against New State Citizens, by Classifying Them Based on Their Length of Residency in the State

This Court has plainly held strict scrutiny applicable to laws like California's, that discriminate against new state residents with respect to the basic necessities of life. Like the state provisions invalidated in *Shapiro* and *Memorial Hospital*, the California durational residency law

[21] There is only one case, easily distinguishable from this one, in which any court upheld a public assistance waiting period of any length. In *Jones v. Milwaukee County*, 485 N.W.2d 21 (1992), the Wisconsin Supreme Court upheld a 60-day "waiting period requirement" for general relief, concluding that "the 60 day waiting period [was] so substantially less onerous than the one year waiting period of *Shapiro*." *Id.* at 902. The court took note of the fact that the 60-day waiting period was designed " 'to establish the bona fides of the applicant's residency.' " *Id.* at 903.

discriminates against newcomers by creating "classes of needy resident families 'indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction.' " *Memorial Hospital*, 415 U.S. at 254 (quoting *Shapiro*, 394 U.S. at 627). *Shapiro* expressly repudiated the "welfare magnet" rationale, identical to that offered here, that the laws were "designed to protect the jurisdiction[s] from an influx of persons seeking more generous public assistance than might be available elsewhere." *Id.* at 629. Relying upon Chief Justice Taney's dissent in *The Passenger Cases*, the Court declared that "the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible." *Id.* at 629-30.[22] The Court applied strict scrutiny, and held that states' legitimate concern for the "saving of welfare costs" could not support the discriminatory means chosen to accomplish this objective. *Id.* at 633.

Because the California statute discriminates against new residents, it is no less violative of the rights to free interstate migration and equal protection than the laws in *Shapiro*, and is subject to strict scrutiny.[23] The State's

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[22] *See also Shapiro*, 394 U.S. at 631 ("[A] State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally.").

[23] The United States coins an argument that, because of the subsequent federal statute authorizing certain state durational residency requirements, 42 U.S.C. §604(c), the California statute should be subjected to intermediate scrutiny. U.S. Amicus at 10, 26. There is no reason why the existence of the federal statute should diminish the **level of scrutiny** to which a discriminatory state classification is subjected. At most, the presence of a federal statute might give rise to some additional rationales for the state law to be considered under the applicable level of scrutiny – although, as we explain *infra*, at 45-50, §604(c) was enacted *post hoc* and, in any event, provides no justifications that will satisfy any level of scrutiny, but simply repackages the state's impermissible aims.

argument for lesser scrutiny depends upon its failure to acknowledge this Court's repeated insistence that the fundamental right to interstate migration encompasses both "actual barriers" to travel and "being treated differently" from longer-term state residents. *Bray*, 506 U.S. at 277 (quoting *Zobel*, 457 U.S. at 60 n.6). Its analysis would necessarily accord inferior status to the right of newer state citizens to be treated equally – notwithstanding this Court's repeated recognition that it is no less an essential component of the "federal guarantee of interstate travel" than the prohibition against actual barriers. *Id.* at 276. If any right is fundamental to our constitutional structure, it is that of all United States citizens to become full-fledged citizens of their state of choice by establishing bona fide residence therein. The State's contrary argument severs the prohibition against discriminatory treatment of newcomers from its national unity roots.

The State further argues that *Shapiro*'s strict scrutiny analysis is inapplicable because the California statute does not "penalize" new residents, but simply limits them to the amount that they would have received in their prior states, thus making them no worse off than they were before. State Br. at 22-24, 26.[24] This argument not only misstates the unchallenged facts of this case, but

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[24] Petitioners rely heavily on *Dandridge v. Williams*, 397 U.S. 471 (1971) to support their argument that rational basis review applies. Yet that case had nothing to do with differential benefits provided to newcomer residents, nor did it implicate interstate migration in any other way, but merely imposed a maximum benefit level on "large families." *See id.* at 484 n.16 (distinguishing *Shapiro*). As the Court expressly stated: "Although a State may adopt a maximum grant system . . . , it may not, of course, impose a regime of invidious discrimination in violation of the Equal Protection Clause. . . ." *Dandridge* is therefore irrelevant to laws, like the one at issue here, that discriminate against newcomers or are intended to discourage migration into the state.

disregards the legal principle set forth in *Shapiro* and refined in subsequent right-to-migrate cases.[25]

As a factual matter, the State is simply wrong to argue that newcomer Californians will "suffer no detriment," compared to how they would have fared in their prior states of residence. State Br. at 17. Relying on undisputed evidence, the district court found: " '[B]ecause California's housing costs are high relative to most states and because welfare families in California are less likely than welfare families in any state[] to live in subsidized housing, the residency requirement will place many recently arrived welfare families on an inferior footing relative to welfare families in the state from which the newcomers moved.' " *Roe*, 966 F. Supp. at 981 (quotation omitted); *see also* J.A. 94.[26] Contrary to the State's contention, then, newcomer families will be in worse straits – many in substantially worse straits – than they would have been in their prior states of residence.

As a matter of law, the State's argument rests on a misapprehension of this Court's right-to-migrate jurisprudence in two fundamental respects. First, as this Court has consistently held, the relevant right is the freedom to migrate to, settle in, and thereby become a full citizen of, the state of one's choice, without "being disadvantaged because of . . . recent migration" or "otherwise **being treated differently from longer term residents.**" *Zobel*, 457 U.S. at 60 n.6 (emphasis added); *see also id.* at 76

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[25] Petitioners' argument fails even to distinguish *Shapiro* on its facts. As in this case, the denial of benefits considered in *Shapiro* was not in all instances total either. Although two of the three states involved (Connecticut and Pennsylvania) gave "partial assistance," these schemes were nevertheless invalidated. 394 U.S. at 635.

[26] *See also Green*, 811 F. Supp. at 521. The State makes no claim that these findings as to impact of the statute were erroneous, much less clearly erroneous as would be required to overturn the preliminary injunction.

n.6 (O'Connor, J., concurring) ("It is immaterial, for purposes of the Privileges and Immunities Clause, that the nonresident may enjoy a benefit in the New State that he lacked completely in his former State. The Clause addresses only differences in treatment. . . . "). The problem with the State's analysis is that, instead of comparing "newcomers and longer term residents," it compares new Californians – including those who are native Californians returning to the State – to residents of their former states. State Br. at 17, 23-24. Nowhere has this Court even remotely suggested that this is the proper test. In *Shapiro* and *Memorial Hospital*, for example, this Court did not ask whether newcomers were worse off than they had been before migrating; instead, the Court asked whether the state law "create[d] a classification which constitutes an invidious discrimination denying [new residents] equal protection of the laws." *Shapiro*, 394 U.S. at 627. The proper question, then, is whether new Californians are being treated less favorably than **other Californians**, not whether new Californians are receiving less than they would have received, had they never left Oklahoma or Mississippi. *See Zobel*, 457 U.S. at 60-65.

If the reformulation applied by the State were correct, then *Zobel* would necessarily have come out the opposite way. No state other than Alaska provided bounty payments to its citizens based on years of state residency. Therefore, under the State's argument, Alaska should have been free to pay new Alaska residents precisely the bounty that residents of other states received: nothing at all.[27] Similarly, states that have no income tax would be free to impose income taxes on newcomer state residents alone, either to discourage them from migrating

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[27] Nor was it of any "significance in *Memorial Hospital* that the non-emergency care provided by Maricopa County may have been much superior to the medical care provided elsewhere." *Green*, 811 F. Supp. at 521.

or to augment state coffers. So long as newcomer residents were taxed at the rates they would have been assessed in their prior states, such a taxation scheme would present no constitutional problems under the State's analysis. By the same token, a state like California that has adopted a higher minimum wage than the national minimum could, in order to prevent low-wage workers from coming into the state, make an exception for newcomers allowing them to be paid less than everyone else. If California's rule were accepted, then states would be free to hoard resources for longer-term residents in a variety of ways, either by keeping newcomers from sharing equally in state benefits or by requiring newcomers to bear a disproportionate share of state burdens.[28]

The second error in the State's analysis is that it introduces a definition of "penalty" that is foreign to the Court's doctrine, and completely unmanageable in practice. The cases striking down durational residency requirements have never required a showing that people have actually been deterred from migrating, nor have they hinged on measurement of how much worse off newcomers are. *See supra*, at 20; *Memorial Hospital*, 415 U.S. at 258 ("An attempt to distinguish *Shapiro* by urging that a durational residence requirement . . . did not deter travel, was found to be a 'fundamental misunderstanding of the law' in *Dunn*, [405 U.S.] at 339-340."). These cases instead turn on whether the laws in question "impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right." *Dunn*, 405 U.S. at 342. It makes no difference whether the denial to new California citizens is

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[28] The State has admitted that such rules would be permissible under their formulation: "At oral argument counsel acknowledged that under the defendants' analytical approach, any State service, benefit or, indeed, tax or other imposition, keyed to the level of the new resident's former state would be constitutional." *Roe*, 966 F. Supp. at 984 n.17.

100%, 80% or some lesser percentage of the level that the state legislature has deemed appropriate for others in need of assistance. Nor does it matter whether the duration of the residency requirement is one year, three years, or forever. The material question, instead, is whether newcomers are **"treated differently"** than longer-term residents, *Bray*, 506 U.S. at 277 (quoting *Zobel*, 457 U.S. at 60 n.6) (emphasis added). In arguing that this clear test should be replaced with an inquiry into whether there has been a "significant and severe penalty on travel" (State Br. at 26), Petitioners advocate a vague standard that would require the lower courts to make individualized inquiries into how drastic an impediment to migration the State has imposed in each case.[29]

The State attempts to avoid the rule requiring strict scrutiny of laws discriminating against newcomers in the

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[29] The responses by counsel for the State of California to questions from Members of the Court at oral argument in *Anderson v. Green* are illustrative of the State's flawed analysis:

> QUESTION: . . . [L]et me ask you, would a 3-year waiting period raise problems that this statute doesn't?
>
> COUNSEL: I believe amounts over a year would raise more problems. It would raise progressively more problems.
>
> QUESTION: Why is that, if it's not a penalty, it's not a penalty?
>
> * * *
>
> QUESTION: Under what constitutional standard? What constitutional rule would be violated?
>
> COUNSEL: Well, it would be a penalty at that point. It would impact more on a right to travel at that point.
>
> QUESTION: So the longer the disability, the more it impinges on the right to travel?
>
> COUNSEL: I think we would have to admit that, yes.

Tr. Jan. 17, 1995, at 19.

area of public assistance, by arguing that this case involves only a temporary rather than a permanent classification – and therefore, presumably, a less severe sanction against newcomers' decision to settle in their state of choice. State Br. at 19-20. This line of reasoning, cannot distinguish *Shapiro*, *Memorial Hospital*, or *Dunn* all of which invalidated one-year waiting periods. As in *Shapiro* and *Memorial Hospital*, the plaintiffs here are deprived of something that is "necessary for basic sustenance," *Memorial Hospital*, 415 U.S. at 259, the benefit of which is lost forever if not provided when needed. *See id.* at 259 n.15 (contrasting "necessities of life" with in-state tuition).

Nor is the State's temporary/permanent distinction consistent with the reasoning in other cases decided by this Court. The basis for the holding in *Zobel*, for example, was not that the Alaska statute was a permanent classification or that it actually had the effect of deterring people from settling in the state. The Court instead rested its decision on the fact that the Alaska statute drew "distinctions between residents based on when they arrived in the State." *Id.* at 60 n.6. If the Alaska legislature had chosen in 1979 to make the oil bounty dividend a one-time special distribution to citizens graduated by years of residence, as opposed to an ongoing one, the scheme would have been no less irrational. Chief Justice Burger's admonition that "Alaska's reasoning could open the door to state apportionments of other rights, benefits, and services according to length of residency," *id.* at 64, would apply with no less force to such a discriminatory allocation of public goods.

The California statute is even more clearly in conflict with the principle forbidding discriminatory treatment of new arrivals than the schemes at issue in *Zobel*, *Shapiro*, and *Memorial Hospital*. Justice O'Connor's description of Alaska's scheme as "classif[ying] citizens on the basis of their former residential status," *Zobel*, 457 U.S. at 75, applies with even greater force to California's scheme, which classifies Californians based not just on their recency of arrival, but also on the state from which they

came into 44 separate categories.[30] Our federal structure does not countenance such multi-tiered distinctions among bona fide state citizens based on when – and from where – they arrived.

B. The California Statute Has the Impermissible Purpose of Deterring Migration into the State

Wholly apart from its facial discrimination against newcomers, the California law must be held unconstitutional because of its undisguised purpose of deterring people from settling in California. *See supra*, at 4-7. The prohibition against laws drawn with an invidious purpose is a familiar principle in our constitutional law.[31] This Court has unwaveringly held that any law enacted with "[a] state objective to inhibit migration into the state would encounter 'insurmountable constitutional difficulties.' " *Hooper*, 472 U.S. at 620 n.9 (quoting *Zobel*, 457 U.S. at 62 n.9); *Memorial Hospital*, 415 U.S. at 263-64 ("to the extent the purpose of the requirement is to inhibit the immigration of indigents generally, that goal is constitutionally impermissible"); *Shapiro*, 394

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[30] Newcomers are divided into 44 (rather than 50) categories since there are five states with assistance levels that, in absolute terms, are higher than California's. Newcomers from these states receive the same amount as longer-term Californians.

[31] *See, e.g., Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (proof of racially discriminatory intent sufficient to trigger strict scrutiny under Equal Protection Clause); *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987) (purpose to promote religion renders statute presumptively invalid under the Establishment Clause); *Madsen v. Women's Health Center*, 512 U.S. 753, 763 (1994) (in determining whether a law is content-based in presumptive violation of the Free Speech Clause, "[w]e . . . look to the government's purpose as the threshold consideration.").

U.S. at 629.[32] In *Memorial Hospital*, for example, this Court held:

> "[A] State may no more try to fence out those indigents who seek [better public medical facilities] than it may try to fence out indigents generally." An indigent who considers the quality of public hospital facilities in entering the State is no less deserving than one who moves into the State in order to take advantage of its better educational facilities.

415 U.S. at 264 (quoting and citing *Shapiro*, 394 U.S. at 631-32; bracketed phrase in original).[33]

To be sure, one of the "numerous advantages" deriving from a "decentralized government" of "joint sovereigns" is the "allow[ance] for more innovation and experimentation in government." *Gregory v. Ashcroft*, 501 U.S. at 458. States may not, however, attempt to prevent newcomers from participating in such innovations. Otherwise, states would be free to pick and choose the membership of their communities, or otherwise excuse themselves from national problems, by shifting responsibility to other

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[32] As set forth in the Social Scientists' Amicus Brief, the available research undermines the State's hypothesis that people migrate from one state to another for the purpose of increasing their benefits; *see also* J.A. 119-44.

[33] *See also Shapiro*, 394 U.S. at 633 ("[N]either deterrence of indigents from migrating to the State nor limitation of welfare benefits to those regarded as contributing to the State is a constitutionally permissible state objective"); *Memorial Hospital*, 415 U.S. at 282 (Rehnquist, J., dissenting) (distinguishing the Arizona law from one that "was specifically designed to . . . deter indigent persons from entering the State of California"); *id.* at 283 (distinguishing a "purposeful attempt to insulate the State from indigents"); *id.* at 284 ("purposeful barriers [were] struck down in *Edwards* and *Shapiro*"); *id.* at 285 ("the Court should examine . . . whether the challenged requirement erects a . . . purposeful barrier").

states.[34] Petitioners' contrary argument is therefore on a collision course with Justice O'Connor's insight in *Zobel* that our federal system guarantees individuals the right to shop around for States with programs best suited to their needs or tastes. 457 U.S. at 77 (O'Connor, J., concurring). Under Petitioners' argument, a state that has adopted a unique and innovative job training program under TANF could bar newcomers from participating in the program altogether. States would be free to deny this and all manner of other public goods to their newer citizens, on the ground that those citizens would be "no worse off" than they were in their prior states.[35]

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[34] As this Court explained in *Edwards v. California*:

> The State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. . . . But this does not mean that there are no boundaries to the permissible area of State legislative activity. There are. And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders.

314 U.S. at 173.

[35] While the United States properly acknowledges that "discouraging poor people generally from settling in the State" is an "invidious purpose" (U.S. Amicus at 30 n.11), it conclusorily asserts that the record does not provide an adequate basis for assessing whether this was the California law's purpose. *Id.* at 10, 28. In fact, the undisputed evidence below, including defendants' own assertions as to the law's intent, leaves no doubt that section 11450.03 was primarily designed to discourage indigent families from settling in the State. *Roe*, 134 F.3d at 1404; *see also Green*, 811 F. Supp. at 521-22 & n.14.

III. The State Offers No Justification For Its Discrimination against Newcomers That Is Adequate Under Any Level of Constitutional Scrutiny

A. The State's Asserted Fiscal Objectives Cannot Justify California's Discrimination Against Its Newer Citizens

Disregarding the statute's text and legislative history, as well as their own representations to the federal government and throughout the litigation, Petitioners now assert conservation of fiscal resources as the statute's principal purpose. This Court has repeatedly held that such an interest cannot justify laws that classify citizens based on the length of their residency, and thereby places the fiscal burden squarely on the backs of newcomers:

> [A] State may not protect the public fisc by drawing an invidious distinction between classes of its citizens . . . , so appellees must do more than show that denying free medical care to new residents saves money.

Memorial Hospital, 415 U.S. at 263 (citation omitted).

Even if heightened scrutiny is not applied, the California statute must still be held unconstitutional. Once it is "stripped of the unconstitutional purpose of deterring migration" it lacks any "rational design," *Green*, 811 F. Supp. at 522-23, in several respects:

1. The California statute accomplishes its purported fiscal aims exclusively by the impermissible means of discriminating against new state citizens[36] – notwithstanding

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[36] This Court has never had difficulty piercing state attempts to disguise such discrimination against outsiders. For example, in the related context of economic protectionism prohibited by the dormant Commerce Clause, this Court has consistently noted that " 'the evil of protectionism can reside in legislative means as well as legislative ends.' " *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 360 (1992) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978)). A protectionist statute might aim to " 'assure a steady supply of milk,' " or " 'to reduce the waste disposal costs,' " in addition to aiming at favoring insiders over outsiders. *Id.* But the Court has never hesitated to strike such statutes down, notwithstanding their "presumably legitimate goal," where they involve the "illegitimate means of isolating the State from the national economy." *Philadelphia v. New Jersey*, 437 U.S. at 627.

that they are no better able to withstand reduction in subsistence level benefits than longer term residents. *Id.* at 523.

2. The irrationality of California's scheme is compounded by the further multiple distinctions it draws among new residents depending on their state of previous residence. Even if the State could somehow show that new residents generally had lesser needs, there is certainly no evidence or basis to conclude that new residents migrating from Mississippi, for example, need 80% less to live in California than new residents migrating from Alaska.

3. The purported fiscal justification is particularly irrational given that, even using the State's own estimates, newcomer families constitute less than one percent of the total number of families receiving assistance. *See, supra*, at 2-3 & n.4. The undisputed record demonstrated that California could easily have saved the modest amount it allegedly seeks to conserve through the alternative of reducing assistance to all recipients by just 72 cents per month. Pet App. 36-37; *see supra*, at 7. Even by the State's own estimate, the amount to be saved by implementation of section 11450.03 is minuscule, amounting to 0.38% of the total program budget – and the percentage going to newcomers who came for the purpose of receiving higher benefits is necessarily even less than that.

4. Within the class of newcomers, the State's scheme makes no attempt to discern which have come into the State for the purpose of receiving higher benefits. As the California Legislative Analyst has acknowledged, newcomers receiving aid may have migrated to California for

any number of reasons other than maximizing their benefit level. J.A. 60-61. The California statute nevertheless denies full benefits to all newcomers – including those who received welfare in the state of prior residence and those who did not, those who need welfare when they arrive in California and those who come to that need months thereafter. *Green*, 811 F. Supp. at 522.[37] It offers them no opportunity to demonstrate, for example, that they settled in California to accept or seek employment, to escape domestic violence, or to secure the advantages of a state TANF program offering superior employment or educational opportunities.

Even if the State had some legitimate basis for concluding that some welfare recipients come to California for the purpose of receiving higher benefits, and that this "welfare magnet" effect was imposing a substantial fiscal burden, California's scheme would still be insupportable. As this Court pointed out in *Vlandis*, "apportion[ment of] tuition rates on the basis of old and new residency . . . would give rise to grave problems under the Equal Protection Clause," 412 U.S. at 450 n.6, since "the State has reasonable alternative means of making the crucial determination." *Id.* at 452. So too, in this case, the State has reasonable alternative means by which to determine whether new arrivals to California came for the purpose of obtaining higher benefits. Section 11450.03 does not provide for such a determination, but instead, like the statute in *Vlandis*, operates on a blanket presumption that all new arrivals came to avail themselves of California's assistance levels.

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[37] Nor is there any reason why new Californians whose last residence was a foreign nation should be accorded superior status to newcomers from within the United States. *See Roe*, 966 F. Supp. at 980.

B. As the State Has Never Denied, the California Statute Cannot be Justified as an Attempt to Determine Bona Fide Residency

The California statute's one-year durational residency requirement cannot be upheld as a means by which to determine bona fide California residency. California's one-year durational residency requirement does not purport to be a bona fide residency requirement, but instead denies full benefits to bona fide California residents who have settled in the State during the past 12 months.[38]

This Court, moreover, has repeatedly struck down extended length of residence distinctions as measures of bona fide residence. The only exception has been a one-year requirement for lower in-state university tuition turning on the transient character of students and the risk that students will misrepresent their true domicile. The Court in *Zobel* pointed out that its summary affirmance in *Starns v. Masterson*, 401 U.S. 985, "cannot be read as a contrary decision of this Court," and that it considered Minnesota's

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[38] That the 12-month requirement cannot be supported as a means by which to assess bona fide California residency is confirmed by California Government Code §244, which defines residence as the "place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose." All members of the plaintiff class are indisputably California residents under this definition.

Furthermore, the State already has regulations designed to determine whether someone applying for benefits is indeed a bona fide resident. For example, a person who buys or leases a home, works, or obtains a driver's license in another state is presumed not to have the intent to reside in California. Manual of Policies & Procedures ("MPP") §42-407.235. Likewise, whenever a recipient is absent from California for 30 days or more, the agency must investigate his or her intent to return, and absence of 60 days or more is prima facie evidence of intent to abandon California residence. Cal. Welf. & Inst. Code §11100; MPP §§42-406.1, 407.21, 407.23.

requirement "a test of bona fide residence." 457 U.S. at 64 n.13; *see also Martinez v. Bynum*, 461 U.S. 321, 328 (1983) ("A bona fide residence requirement appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for [state] residents are enjoyed only by residents."); *Vlandis*, 412 U.S. at 453-54 (state may "establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.").

Sosna v. Iowa, 419 U.S. 393 (1975), is likewise consistent with the structural principles of national unity and interstate accord underlying the Court's invalidation of residency requirements in *Shapiro, Memorial Hospital, Dunn, Zobel, Soto-Lopez* and *Hooper*. In *Sosna*, the Court upheld Iowa's one-year waiting period for divorce decrees, as a means by which to ensure that the state did not become a "divorce mill" for those not who did not really "intend[] to remain in the State." *Id.* at 407. The Court reasoned that "the state interest in requiring that those who seek a divorce from its courts be genuinely attached to the State, as well as a desire to insulate divorce decrees from the likelihood of collateral attack, requires a different resolution . . . than was the case in *Shapiro, Dunn*, and *Maricopa County*." *Id.* at 409 (citations omitted); *see also Zobel*, 457 U.S. at 78 n.8 (O'Connor, J., concurring).[39] The Court stressed that the requirement "additionally furthers the

[39] *Sosna* also relied on the facts that "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." 419 U.S. at 404. In contrast to domestic relations, the area of public welfare assistance is decidedly **not** one that has "long been regarded as a virtually exclusive province" of the states, *id.* but is one over which the federal and state governments have long shared responsibility. *See, e.g., Townsend v. Shenk*, 404 U.S. 282, 291 (1971).

State's parallel interests both in avoiding officious intermeddling in matters in which another State has a paramount interest, and in minimizing the susceptibility of its own divorce decrees to collateral attack." *Sosna*, 419 U.S. at 407.[40] The State has identified no comparable interest in this case, nor is any such interest conceivable.

The same structural principles on which *Sosna* relied compel invalidation of the California statute. As Justice O'Connor has explained, Iowa was understandably concerned that "nonresidents were a peculiar source of the evil addressed" because they "could misrepresent their attachment to Iowa and obtain divorces," *Zobel*, 457 U.S. at 78 n.8 (O'Connor, J., concurring), only to transport the benefits of Iowa's decrees elsewhere immediately.[41] The Iowa law and the California statute are therefore polar opposites. The Iowa law was targeted at divorce litigants because they lacked genuine intent to remain within the

[40] The Court explained: "A State such as Iowa may quite reasonably decide that it does not wish to become a divorce mill for unhappy spouses who have lived there as short a time as appellant had when she commenced her action in the state court after having long resided elsewhere. Until such time as Iowa is convinced that appellant intends to remain in the State, it lacks the 'nexus between person and place of such permanence to control the creation of legal relations and responsibilities of the utmost significance.' " *Id.* at 407 (citation omitted).

[41] Unlike divorce decrees or college educations, subsistence payments are not transportable to other states; rather the benefits cease should the recipient relocate to another state. The *Sosna* Court expressly relied on this difference between welfare benefits and divorce decrees, in noting that the Iowa law did not "irrevocably" prevent the plaintiff from obtaining "some part of what she sought, as was the case with the welfare recipients in *Shapiro*, the voters in *Dunn*, or the indigent patient in *Maricopa County*." 419 U.S. at 406. While the benefits of divorce decrees may be enjoyed even if delayed, the benefits of public assistance are lost forever if not received when needed.

State. In contrast, California is targeting individuals precisely because they **do** intend to remain: It is their settlement in and consequent attachment to the State that the statute aims to discourage.

IV. The Subsequently Enacted Federal Statute Does Not Affect The Unconstitutionality of the California Statute

Nothing in the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), passed by Congress after the enactment of section 11450.03, alters the analysis under this Court's durational residency jurisprudence or cures the constitutional infirmity in the California statute. It is settled law that Congress' approval of a state's discriminatory practice is irrelevant to its unconstitutionality under the Fourteenth Amendment. This Court has never suggested that Congress has the power to turn state citizenship into a seniority system, or allow states to do so, by classifying citizens based on length of residency.

A. Congress Has No Power to Authorize or Cure the Unconstitutionality of a State Law That Impermissibly Discriminates Against State Citizens Based on Their Length of Residency

Although the PRWORA was presumably enacted pursuant to Congress' spending power, it is settled law that this "power may not be used to induce the States to engage in activities that would themselves be unconstitutional." *South Dakota v. Dole*, 483 U.S. 203, 210 (1987). It is an equally established principle, reiterated by this Court in a variety of contexts, that Congress lacks the power to authorize a state's discriminatory classification. Thus, in *Shapiro v. Thompson*, this Court squarely repudiated the very argument made by Petitioners and the United States in this case. Just as in this case, the state defendants in *Shapiro* argued that "the constitutional challenge to the waiting period requirements must fail because Congress expressly approved the imposition of the requirement by

the States. . . . " 394 U.S. at 638. The Court held that the existence of this federal statute, even if read to "approve the imposition of a one-year waiting period," could not undo the unconstitutionality of the state statutes' discrimination against bona fide residents based upon their recent arrival in violation of their right to equal protection. *Id.* at 641.

As an initial matter, Petitioners' argument repeats the analytic error made by the states in *Shapiro*. As in *Shapiro*, what is being challenged here is not the federal law, but a discriminatory state statute that treats newcomers differently because of their recent migration to the state:

> [I]t is the responsive state legislation which infringes constitutional rights. By itself [the federal statute] has absolutely no restrictive effect. It is therefore not that statute but only the state requirements which pose the constitutional question.

Id.

The *Shapiro* Court further explained that the federal statute, even if directly at issue, could not remedy the unconstitutionality of the one-year durational residency requirements: "Congress may not authorize the States to violate the Equal Protection Clause." 394 U.S. at 641.[42] So too in this case, the fact that, subsequent to the enactment of section 11450.03, Congress purported to authorize states to enact such laws does not alter the constitutional analysis. The Court has repeatedly reaffirmed the principle, ignored by the State, that: "Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 732-33 (1982) (rejecting an argument by a state university that Congress

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[42] *See also Townsend v. Shenk*, 404 U.S. at 291; *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966); *Macias v. Finch*, 324 F. Supp. 1252, 1258 (N.D. Cal.) (three-judge court), *aff'd sub nom., Macias v. Richardson*, 400 U.S. 913 (1970).

had authorized it to deny enrollment to qualified males).[43] Even if the federal statute were being directly challenged here, discrimination against newcomers perpetuated by the federal government would fare no better than the state's. *See Adarand*, 515 U.S. at 217, ("[T]his Court's approach to Fifth Amendment equal protection claims has always been the same as to equal protection claims under the Fourteenth Amendment.") (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975)).

B. Congress Has No More Authority Than the States to Classify State Citizens Based on Their Length of Residency in the State

Petitioners' reliance on PRWORA hinges on the argument that Congress may authorize states to do something that the states may not themselves do: to classify citizens of a State based on their length of residency within that State. The State's theory therefore creates an obvious and irreconcilable conflict not only with settled equal protection doctrine but also with the Citizenship Clause of the Fourteenth Amendment, which denies both Congress and the states the power to render some residents of a state "less equal" than others.[44]

If the Citizenship Clause means anything, it must mean that, once bona fide residency in a state is established, a United States citizen becomes a full-fledged citizen of the state within which he or she has chosen to reside. That person's state citizenship is encased from interference by federal and state governments alike. This is

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[43] The *Shapiro* Court, after holding state durational residency statutes unconstitutional, went on to hold a one-year waiting period adopted by **Congress** for the District of Columbia unconstitutional under the Fifth Amendment. 394 U.S. at 642.

[44] The Clause reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside."

clear both from the text and from the history of the Citizenship Clause. The Citizenship Clause does not just restrain state governments, but prevents both the state and federal governments from denying state citizenship to any bona fide state residents.

The reason for taking the power out of the hand of both the states and Congress is readily apparent. The Fugitive Slave Acts of 1793 and 1850 were prominent features of the backdrop against which the Fourteenth Amendment was enacted. *See, e.g.*, HENRY MAYER, ALL ON FIRE 310-11, 407 (1998) ("It was clear to all parties that the 1850 Fugitive Slave Law was . . . a deliberate condemnation of the abolitionist agitation that had unsettled traditional politics, . . . "); PAUL FINKELMAN, AN IMPERFECT UNION 3 (1981) ("The status of fugitive slaves . . . was preempted by the Constitution's Fugitive Slave Clause and ultimately by two federal statutes implementing it."). The Union's then-recent history thus makes it highly implausible that the framers of the Fourteenth Amendment would have sought to curb the power of the states to deny equal citizenship to all their residents, while leaving the federal government free to do just that. If anything, vesting power to limit state citizenship in Congress would have been more destructive to the object of national unification – and more likely to generate friction among the states – than vesting this power in the several states. To paraphrase Chief Justice Taney, leaving such a power in Congress' hands could produce nothing but "discord and mutual irritation" for the recently reconstituted United States. *See The Passenger Cases*, 48 U.S. at 492 (Taney, C.J., dissenting). The Fourteenth Amendment thus expressly denies Congress as well as the states the power to authorize discrimination against new state citizens based on the recency of their arrival.

C. Allowing Congress to Interfere with the Right to Interstate Migration Would Decimate the Political Unification Objectives Upon Which That Right is Based

Even aside from the Fourteenth Amendment, the Constitution does not permit Congress to create barriers to interstate migration or to authorize discrimination against newcomers. *Bray* reiterates the longstanding principle that the "guarantee of interstate travel" prohibits not only " 'the erection of actual barriers to migration' " but also " 'being treated differently' from intrastate travelers." 506 U.S. at 277 (quoting *Zobel*, 457 U.S. at 60 n.6). The *Bray* majority decisively rejected the argument that the freedom of interstate migration was rooted in the Commerce Clause – and the concomitant argument that Congress would have the power to tamper with the right of migration between states.

Responding to the dissent's argument that "conduct that evenhandedly disrupts both local and interstate travel" may violate the Commerce Clause, 506 U.S. at 276-77 n.7 (quoting *id.* at 337 (Stevens, J., dissenting)), *Bray* unequivocally confirmed Congress' lack of power to abrogate the right to travel:

> Justice Stevens expresses incredulity at the rule we have described. . . . We cite right-to-travel cases for our position; he cites nothing but negative Commerce Clause cases for his. While it is always pleasant to greet such old Commerce Clause warhorses as *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951) and *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945), cited *post*, at 337, . . . surely they are irrelevant to the individual right of interstate travel we are here discussing. **That right does not derive from the negative Commerce Clause, or else it could be eliminated by Congress.**

Bray, 506 U.S. at 277 n.7 (emphasis added). *See also Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 881 (1985) (the dormant commerce and equal protection clauses "perform different functions in the analysis of the permissible

scope of a State's power – one protects interstate commerce, and the other protects persons from unconstitutional discrimination by the States.").[45] Whatever the textual sources of the right to free interstate migration, that right is protected from interference by the federal and state governments alike.

D. None of the Purported Justifications Offered by the United States Can Support the California Statute's Discriminatory Classification of New State Citizens

The California statute cannot be sustained by resort to any of the purposes the United States offers up in support of the federal law. In this case, as it has done elsewhere, the United States concedes that a purpose "to deter migration of poor people" bears "no rational relationship to any legitimate state purpose." *Id.* at 19.[46] The lower courts' finding of such purpose here should therefore be sufficient to resolve this case, irrespective of Congress' purpose in enacting the PRWORA.

Even if this Court were to look to the claimed purposes underlying the PRWORA, however, they provide no

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[45] The United States properly acknowledges that the principle of free interstate migration, including the right of newcomer state citizens to be treated the same as old-timers, may not be abridged by Congress any more than by the states. U.S. Amicus at 24.

[46] In *V.C. v. Whitburn* (No. 94-C-1028) (E.D. Wis.), the United States argued that a Wisconsin scheme with a much less severe impact on newcomers "would not be held constitutional" under "existing Supreme Court precedent," J.A. 155-56, pointing out that "Supreme Court cases make clear that the relevant comparison has consistently been between new and longtime residents of the same state," and that " 'neither deterrence of indigents from migrating to the State nor limitation of welfare benefits to those regarded as contributing to the State is a constitutionally permissible state objective.' " *Id.* at 156, 157 (quoting *Shapiro*, 394 U.S. at 633).

support for California's discriminatory classification of relatively new state citizens. The United States concedes that:

> Through Section 11450.03, the State seeks to treat some of its citizens differently from others solely on the basis of how recently they became residents of the State. This Court's cases make clear that any state classification drawn on that basis is constitutionally problematic.

U.S. Amicus at 18. While the United States offers three purported justifications for such differential treatment, close examination reveals each to be dependent upon the same impermissible purposes on which the State relies. The United States' rationales are either a cognate for the State's "welfare magnet" rationale or an end dependent solely upon the impermissible means of "eliminating or mitigating any given individual's perceived incentive to move." U.S. Amicus at 16.

1. *"Distorted incentives."* The first of the "federal purposes" proffered by the United States is to prevent "distorted incentives for interstate migration by benefit recipients." U.S. Amicus at 20; *see also id.* at 15 (describing Congress' goal to "mitigate incentives for interstate migration"). This rationale provides no principled basis for limiting discrimination against newcomer state citizens in the area of TANF benefits. The purported objective of avoiding incentives for interstate migration could be used to justify **any** durational residency requirement restricting the availability of **any** benefit or program to new state citizens.

In reality, the United States' "distorted incentives" rationale simply places a different spin on the State's "welfare magnet" hypothesis. Like the State, the United States relies on the proposition that discouraging migration of needy people who seek higher welfare benefits is a legitimate (and even "important") governmental purpose. There is no evidentiary foundation for the hypothesis that poor people move to and establish residence in a new state to obtain higher public assistance benefits. *See supra*, at

8-9.[47] This hypothesis is doubly suspect here given that no recipient can receive assistance for more than five years in total, regardless of state or states of residence. *See* 42 U.S.C. §608(a)(7); Cal. Welf. & Inst. Code §11320.15; *see supra*, note 1. But even assuming that there is some foundation for this hypothesis, the Constitution does not permit classifications designed to discourage people from settling within a state's boundaries in search of programs better suited to their needs. To the contrary, as Justice O'Connor has put it, our "federal system . . . allows the individual to settle in the State offering those programs best tailored to his or her tastes." *Zobel*, 457 U.S. at 77.

2. *"Choice-of-law."* The second purported justification, echoing throughout the United States' brief, is that the federal statute "addresses the unique choice-of-law considerations that may reasonably be deemed to arise when a participant in one State's implementation of the federal program moves to another State with different rules." U.S. Amicus at 20. But as the United States also concedes, this "choice-of-law" rationale cannot possibly support California's scheme, which applies even to applicants – like the named plaintiffs in this case – who have **never** previously received benefits in any other state. This rationale, accordingly, cannot support California's scheme. *See* U.S. Amicus at 28-29 ("The State's provision is not . . . limited to applicants who were receiving TANF benefits in their prior State of residence at the time they moved, the situation in which the choice-of-law rationale for the limitation most readily applies."). California's law is doubly inexplicable as a choice of law rule, since it applies not to all those who have come from other states, but only to those from states with **lower** benefits.

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[47] The absence of any welfare magnet phenomenon with respect to California is not difficult to understand, given its shortage and high cost of housing for low income families. *See* Social Scientists' Amicus; J.A. 91-97.

The United States' "choice-of-law" rationale would additionally allow a state to "choose" to treat its own citizens as though they were still citizens of their former states. As many times as the United States' brief repeats the phrase "choice-of-law" (U.S. Amicus at 8, 9, 14, 15, 20, 22, 23, 24, 27, 28), it offers no other explanation of what this term is supposed to mean. Nor does this asserted rationale furnish any limiting principle. If it is acceptable for the state to choose to apply another state's laws to its new citizens in this context (at least to the extent that the other state's law affords less favorable treatment), it is difficult to see why states should not always be allowed to do so. Predicated on the unexplained premise that the former state of residence somehow "retains a sufficient connection to the family's continued receipt of benefits under the federal program that its law may properly be taken into account by the destination State during a transition period," (U.S. Amicus at 22), the United States' rule could apparently be applied to any number of public goods that are funded or regulated by the federal government. See U.S. Amicus at 22. A state, for example, might choose to deny its new citizens the benefits of its federally funded job training, education programs or even medical care. *See Memorial Hospital*, 415 U.S. at 261. Beyond its obvious unmanageability, adoption of the rationale would license states to "classif[y] citizens on the basis of their former residential status" by subjecting them to their former state's legal regime. *See Zobel*, 457 U.S. at 75 (O'Connor, J., concurring).

3. *"Race to the bottom."* The third "federal purpose" asserted by the United States is to "mitigat[e] any tendency . . . toward a 'race to the bottom' in the State-by-State establishment of benefit levels." U.S. Amicus at 20. While acknowledging "doubt[ ]" as to whether "an individual State, pursuing its own interests, would ever have valid reasons for distinguishing new citizens from old in allocating benefits in a program designed and funded solely by the State," *id.*, the United States argues that the

existence of the federal statute and federal funding somehow legitimates such discrimination.

As an initial matter, the United States' "race to the bottom" argument rests on two false premises: (1) as a result of the differences in the amount of benefits offered by different states, a substantial number of recipients will actually decide to migrate interstate in order to obtain higher welfare benefits and (2) that the higher-paying states will thereupon lower the amounts they pay to all their residents, in order to discourage such migration. The first premise is contradicted by the evidence of record. *See supra*, at 8-9; J.A. 115-17, 119-44; Social Scientists' Amicus. The second premise is also demonstrably false, as states have in fact chosen to offer widely varying levels of public assistance, as they have always been free to do, J.A. 26, notwithstanding the theoretical possibility that recipients might choose to move interstate to obtain higher benefits.

More fundamentally, the United States' "race to the bottom" rationale would prove far too much. Whenever states choose to offer different benefits or programs, there is always the theoretical possibility that some people will be attracted to migrate to the state with offerings best suited to their needs. The "race to the bottom" rationale thus turns on its head one of the cardinal rules of our constitutional structure: " '[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.' " *New York v. United States*, 505 U.S. 144, 181 (1992) (citation omitted). Among the most important benefits of decentralized government is that "a mobile citizenry" may make considered judgments about the nationwide marketplace of programs, to find those best suited to her needs and aspirations or to those of her family. *See Gregory v. Ashcroft*, 501 U.S. at 458. Even aside from the rule that deterring migration is constitutionally impermissible, whether as an end or means, the rationale identified could be cited whenever a state sought to pull any of its programs, benefits, or protections from the marketplace. A real or imagined "race-to-the-bottom" might then form the basis to impose durational residency requirements for a

virtually limitless set of public goods: e.g., job training; community colleges; minimum wage; tax breaks; child care for working parents; affordable and public housing; and educational reforms like class size reduction. A State could always claim that it feared offering these items to newer citizens, lest they serve as a "magnet" that would induce people to settle in the state, jeopardize the resources available for longer-term residents, and discourage social reforms by the State.

CONCLUSION

For the foregoing reasons the decision of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Dated: December 8, 1998

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In The

Supreme Court of the United States

October Term, 1998

ELOISE ANDERSON, Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; and CRAIG L. BROWN, Director, California Department of Finance,

Petitioners,

v.

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REPLY TO RESPONDENTS' BRIEF ON THE MERITS

Petitioners, Eloise Anderson, Director, California Department of Social Services; the California Department of Social Services; the Honorable Pete Wilson, Governor of the State of California; and Craig L. Brown, Director, California Department of Finance (hereafter, "California")[1] reply to respondents' brief on the merits as follows:

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[1] Gray Davis is scheduled to take the oath of office as Governor of the State of California on January 4, 1999, and as such will be the successor in interest to Governor Pete Wilson, who was named in the original pleadings. Thus, before January 13, 1999, the date scheduled for oral argument in this matter, Mr. Davis will be automatically substituted as a party in place of Governor Wilson in the District Court proceedings pursuant to the provisions of Federal Rule of Civil Procedure 25(d) and in these proceedings pursuant to the provisions of Rule 35, subdivision (1) of the Rules of this Court.

Tim Gage is expected to be appointed the new Director of Finance by Governor-elect Davis. He will succeed Craig L. Brown as Director, California Department of Finance on January 4, 1999 and will be substituted as a party in place of Mr. Brown at that time.

Eloise Anderson is expected to resign her position as Director, California Department of Social Services, as of December 31, 1998. An acting director is expected to be appointed at that time, but no decision has yet been made as to who will be appointed.

ARGUMENT

I

CALIFORNIA'S STATUTE DOES NOT OPERATE AS A PENALTY ON MIGRATION. THEREFORE, IT SHOULD BE SUBJECTED ONLY TO A RATIONAL BASIS ANALYSIS

Unhappy with the welfare reform enacted both by the United States Congress through the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), 42 U.S.C. section 601, et seq., and by the California Legislature through California Welfare and Institutions Code section 11450.03 ("section 11450.03") respondents here ("plaintiffs") challenge California's statute on constitutional grounds.

The issue here is not whether California's statute represents good public policy[2]: The issue is, instead, the level of scrutiny by which the constitutionality of section 11450.03 is to be adjudicated. Plaintiffs argue that California's statute is not good public policy. However, such an argument is irrelevant. It does not address the issue presented here: i.e., whether California's statute should be subjected to only a rational basis review.

As stated by California on page 16 of its brief on the merits, the relevant questions are therefore whether section 11450.03 has the purpose of impeding travel as its

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[2] This is the issue addressed by many of the *amici* briefs supporting plaintiffs. To the extent those briefs focus on whetner or not section 11450.03 is good policy, they are of little or no assistance to this Court in resolving the question presented.

primary objective, whether the statute penalizes the exercise of the right to travel, and whether it actually deters travel. California's statute does none of the above.

As noted in California's brief on the merits, the primary objective of section 11450.03 is *not* to impede travel. As there is no purpose expressed in the statute itself, as plaintiffs' exhibits do not reflect applicable legislative history, as the principal effect of the statute is to conserve limited state resources, and as the statute was enacted in conjunction with a federally-approved welfare reform experiment, it is clear that the purpose of the statute is to conserve California's scarce financial resources for all of its citizens by instituting reform of California's welfare system.

On its face, the statute does not erect effective and purposeful barriers to insulate California from indigents in the form of either criminal penalties or complete denials of public assistance. There is nothing in the terms of section 11450.03 which would impede an indigent person from traveling to or settling in California. Thus, the words of the statute make clear that the primary purpose of the statute is *not* to impede travel.

Nor does the statute penalize travel. The statute does not deny welfare benefits outright, as was condemned in *Shapiro v. Thompson*, 394 U.S. 618 (1969)[3] and in *Memorial*

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[3] Plaintiffs attempt to distinguish the Connecticut and Pennsylvania statutes at issue in *Shapiro* from the California statute at issue here, by referring to this Court's reference to the "partial assistance" offered by Connecticut and Pennsylvania. *Shapiro*, at 635; Plaintiffs' Brief on the Merits at 26. Plaintiffs

Hospital v. Maricopa County, 415 U.S. 250 (1974). The statute does not create *permanent* distinctions based on the length of state residency as were struck down in *Zobel v. Williams*, 457 U.S. 55 (1982) (size of payments from oil revenues dependent upon years of residence in Alaska), *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985) (property tax exemptions based on state residence before a specific date), and *State Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986) (preferences for veterans based on length of state residency). The statute explicitly provides that persons subject to the statute receive *at all times* a constitutionally permissible amount of cash aid: either the maximum amount receivable in their prior state of residence, or (after one year of residency) the full amount of the California grant.[4]

Thus, it cannot be said that section 11450.03 penalizes the right to travel as persons subject to the statute are not deprived of the basic necessities of life. As noted above, the statute neither denies nor delays eligibility for cash aid welfare benefits; to the contrary, it provides for a constitutionally permissible amount of cash aid upon arrival in California, assuming all other conditions of

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point out a distinction without a difference. Unlike the California statute, the Connecticut and Pennsylvania statutes *denied eligibility* to newcomers, while offering limited, emergency assistance only. *Shapiro*, 623 n.2, 627 n.5.

[4] Plaintiffs reference the fact that newcomers from foreign countries are not impacted by section 11450.03. (Plaintiffs' Brief on the Merits, n.2.) The issue of immigrant eligibility for federal and state public benefits, including cash aid, is a federal, and not a state issue. It has been addressed by Congress in Title IV of PRWORA.

eligibility are met. The statute has no adverse impact on the receipt of Medicaid benefits or on any other welfare benefit offered by California. In fact, the operation of section 11450.03 increases the amount of Food Stamps issued to persons subject to the statute. Thus, because section 11450.03 temporarily impacts only *one* aspect of California's welfare benefits package and does not even temporarily reduce the amount of cash aid a newcomer was entitled to receive in the prior state of residence, it is *factually not correct* to argue that persons subject to the statute are deprived of the basic necessities of life.

The effect of section 11450.03 on travel is remote and incidental, at best.[5] California's statute neutralizes the level of cash aid available to recipients in California as a factor in a person's decision to move to California. By having no effect on eligibility for welfare, the statute imposes no penalty on interstate migration. Those impacted by the statute still receive a constitutionally permissible level of public assistance. As with all people contemplating a change in their state of residence, public assistance beneficiaries must make decisions on where to live based, in part, on how far their dollars will go in

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[5] Plaintiffs attempt to concoct a new doctrine of constitutional law under which statutes which treat newcomers "differently" from longer term residents are prohibited. (Plaintiffs' Brief on the Merits, at 14-15.) Such is not the case. Plaintiffs derive this attempt to formulate new law from this Court's opinion in *Zobel v. Williams*, 457 U.S. 55, 60 n.60. However, the statement in footnote 6 of *Zobel* is not an enunciation of such a doctrine, but instead merely a statement that when a statute distributes benefits unequally, an equal protection argument may be invoked.

their new home. With a state as large as California, newcomers to California may stretch their dollars depending on where they decide to settle within California.

Finally, section 11450.03 has not been shown to actually deter travel. Plaintiffs have not shown any person who was actually deterred from traveling to California because of the statute's enactment.[6]

All arguments of plaintiffs and their supporting *amici* relating to the high cost of living in California are irrelevant. As noted on page 19 of California's brief on the merits, it is constitutionally permissible for a state to set a benefit level below that state's standard of need. *Dandridge v. Williams*, 397 U.S. 471, 480, 483 (1970). The effect of doing so is a political decision vested in that state's legislature, and is not to be subjected to scrutiny by the judiciary. *Dandridge*, 397 U.S. at 482. Thus, the level of cash aid set by a state's legislature is in no way a guarantee of a certain standard of living. Even in the absence of implementation of section 11450.03, there is no guarantee that newcomers to California will enjoy a standard of living comparable to that which they enjoyed in their state of prior residence. Therefore, plaintiffs cannot argue that the failure of California to supply newcomers with any certain standard of living is a detriment to them or a penalty on their right to travel.

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[6] Some of plaintiffs' supporting *amici* argue that benefit levels are not an incentive for welfare recipients to migrate. Such arguments contradict plaintiffs' statements that section 11450.03 deters them from traveling.

Plaintiffs' argument that section 11450.03 somehow impacts the objective of political unification of our country must therefore fail. In no way does California's statute deny anyone the right to settle in California, nor does it function as a means by which California selects its citizens.

The statute does not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because it neither impacts nor penalizes any fundamental right and because it is free from invidious discrimination against suspect classes. Thus, California need only show that its statute is rationally related to a legitimate state purpose. *Zobel v. Williams*, 457 U.S. 55, 60 (1981). This is the standard by which legislation involving the administration of public benefits is evaluated. *Dandridge*, 397 U.S. at 487.

Plaintiffs prematurely argue that the statute has no rational purpose. The issue under consideration now is solely the standard of review by which the statute should be adjudicated. However, even if relevant, plaintiffs' argument is erroneous. The purpose of the statute is to save government expenditures and to reform California's welfare system. Under a rational basis inquiry, these are adequate justifications for the statute. When implemented, the statute will save government expenditures and will function as part of state and federal welfare reform designed to eliminate economic dependency as a way of life.

Saving the public fisc is a legitimate state purpose, and is an adequate justification for a law being tested by rational basis scrutiny. As this Court stated in *Dandridge*,

397 U.S. at 487, "the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." Plaintiffs argue that, in their opinion, the statute does not save enough money to survive a rational basis inquiry. However, plaintiffs do not state how much money the statute would have to save in order to survive such an inquiry. Nor can they. The answer to that question is a policy decision left to the discretion of the California Legislature – not to plaintiffs or the judiciary.

Regarding the reform of welfare laws to eliminate economic dependency as a way of life, that legitimate goal will rationally be advanced by the application of section 11450.03 to many persons in a number of circumstances, as suggested in petitioners' brief on the merits at pages 5-6 and 26-27. That is enough to satisfy rational basis review. As stated in *Dandridge* at page 485, "[i]f the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " Indeed, in *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-488 (1955), this Court went even further when it stated that a law being tested by rational basis scrutiny "need not be in every respect logically consistent with its aims to be constitutional."

II

SECTION 11450.03 IS NOT SUBJECT TO A HEIGHTENED, INTERMEDIATE STANDARD OF CONSTITUTIONAL REVIEW

The brief of the United States is of little or no assistance in resolving the issues presented in this action. The question presented in California's petition and brief on the merits involves the proper standard of review by this Court. However, the brief of the United States incorrectly states the question presented as whether California's statute "impermissibly burdens an aid recipient's federal constitutional right" to travel. Thus, instead of presenting cogent arguments in favor of a certain standard of review, the United States assumes that the proper standard of review is a heightened, intermediate standard and then discusses whether or not California's statute, in its view, meets that standard. United States Brief at 28.

Any argument that a heightened, intermediate standard of review is the appropriate standard for adjudication of the constitutionality of California's statute must fail because such a standard of review has never been held to be applicable to a statute in the area of economics and social welfare involving the administration of public welfare assistance. As California has repeatedly referenced, the constitutionality of such statutes has always been adjudicated under a rational basis analysis. *Dandridge v. Williams*, 397 U.S. 471. The United States has presented no compelling argument as to why California's statute should now be subjected to any higher scrutiny.

Heightened, intermediate scrutiny has been applied by this Court to discriminatory classifications based on

sex or illegitimacy (*Clark v. Jeter*, 486 U.S. 456 (1988)), to state statutes withholding funds for the education of children of undocumented resident aliens (*Plyler v. Doe*, 457 U.S. 202 (1982)), to restrictions on commercial speech (*Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995)), and to discrimination against nonresidents prohibited by the Privileges and Immunities Clause of the United States Constitution (*Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985)). This action does not involve any of these issues. California's statute does not relate to sex or illegitimacy, the education of undocumented resident aliens or restrictions on commercial speech. It does not discriminate against nonresidents. Instead, section 11450.03 sets levels of cash aid for new California residents and is thus no different from any other statute involving the administration of public welfare assistance.

When this Court has held heightened, intermediate scrutiny to be the appropriate standard of review, it has usually done so because the people affected by the statutes under review have certain immutable characteristics. For example, children of undocumented resident aliens have no control over their status. However, newcomers have made a conscious decision to move to California. They therefore *do* have control over their status as newcomers affected by section 11450.03.

The United States has offered no persuasive reason why a heightened form of scrutiny should be used. The argument of the United States appears to assume that some form of heightened scrutiny is appropriate, and formulates an argument based on justifying which level

of heightened scrutiny is appropriate, instead of explaining why any form of heightened scrutiny is *at all* appropriate. While the United States correctly states that strict scrutiny is an inappropriate standard of review (United States brief, page 28), it offers no explanation why rational basis review might be inappropriate, or why a heightened, intermediate standard of review might be more appropriate than a rational basis standard of review. To the extent the United States does make such an argument, the argument appears to be that because PWRORA delegates to the United States substantial authority to implement an overall federal program in state-specific ways, any implementing state action should be adjudicated under a level of heightened intermediate scrutiny.

However, such an argument is circular and makes little sense in the context of section 11450.03. If the only reason for heightened scrutiny of section 11450.03 is the existence of federal authorization, then the argument of the United States presents this Court with a real anomaly. The United States acknowledges that strict scrutiny is an inappropriate standard of review because any burden imposed by the statute is not sufficient to constitute a penalty on the right to travel. The argument of the United States must therefore be that section 11450.03, *in the absence of federal authorization*, should be scrutinized under a rational basis analysis. Thus, following the argument of the United States, federal authorization for California's statute would result in a higher standard of review than would be appropriate than if such federal authorization were not in existence. Surely, it makes no

sense to argue that federal authorization for a state statute results in a higher level of scrutiny than would result in the absence of such authorization.

The United States further argues that "the premise for applying less-than-strict scrutiny in this class of cases is that Congress has specifically authorized a general type of state classification. . . . " United States Brief at 26. The United States has erred in its analysis. Contrary to the statement of the United States, the premise for not applying strict scrutiny is that California's statute does not implicate or penalize the right to travel and the premise for applying rational basis scrutiny is that California's statute involves the administration of public welfare assistance. However, if the deference argument of the United States is accorded any weight, it necessitates a finding that state enactments such as section 11450.03 which fall squarely within the terms of the federal authorization, which do not implicate or penalize any fundamental right and which involve administration of public welfare assistance, should be subjected to a form of scrutiny no more rigorous than that to which the federal authorization should be subjected. Thus, to the extent that the United States is suggesting that the constitutionality of section 11450.03 should be adjudicated in any manner other than that to which its own authorization should be subjected, that suggestion simply makes no sense.

III

PLAINTIFFS MAY NOT RELY UPON MATERIALS REGARDING PROPOSITION 165 TO SUPPORT THEIR ARGUMENTS REGARDING THE CONSTITUTIONALITY OF THE STATUTE

In order to buttress their claim that section 11450.03 is intended to actually prevent indigent people from moving to California (a purpose that does not appear in the wording of section 11450.03, nor in the legislative history of section 11450.03), plaintiffs rely on extraneous materials. Plaintiffs argue that the purpose of California's statute is analogous to other proposed legislative schemes evidenced by materials plaintiffs submitted in support of their motion for preliminary injunction. These materials deal with California Proposition 165, a voter initiative that did not become law, and California Senate Bill 366, which also was not enacted into law. These materials are irrelevant to this Court's consideration of the statute, as neither Proposition 165 nor Senate Bill 366 is a precursor of section 11450.03.[7]

The precursor of section 11450.03 is Senate Bill 485. (Petition, at 3.) Accordingly, it is inappropriate for plaintiffs to rely on their Exhibits 5 (Supplemental Excerpts of Record filed by plaintiffs with the appellate court, "SER" 49), 6 (SER51), 7 (SER64), 8 (SER67), and 9 (SER85) because those materials are not part of the legislative history of Senate Bill 485. Additionally, to the extent these

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[7] Plaintiffs rely on *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992) for the proposition that legislative history of predecessor bills are appropriately considered. However, there are no predecessor bills to section 11450.03.

materials relate to California Proposition 165, it is inappropriate to rely on these materials as that proposition was rejected by the California electorate.

Also, plaintiff's exhibits are not competent evidence. While affidavits in support of a preliminary injunction need not fit all of the requirements of affidavits in support of a motion for summary judgment, 11 C. Wright and A. Miller, *Federal Practice and Procedure, Civil,* § 2949, at 471 (1973), the materials in the referenced exhibits are not affidavits, verified pleadings, or transcribed deposition materials. The exhibits clearly are not competent evidence.

In *Flynt Distributing Co., Inc. v. Harvey,* 734 F.2d 1389, 1394 (9th Cir. 1984) the court noted that the urgency of obtaining a preliminary injunction necessitates a prompt determination and makes it difficult to obtain affidavits from persons who would be competent to testify at trial. The court held that the trial court may give even inadmissible evidence some weight when to do so serves the purpose of preventing irreparable harm before trial. However, the court in *Flynt* was dealing with a prohibitory injunction, i.e., one which merely maintained the status quo, and not with a mandatory injunction such as that sought by plaintiffs in this case. Therefore, this Court should not consider the referenced exhibits because they are not properly authenticated, they are hearsay to the extent they purport to be testamentary in nature, and they clearly are not relevant.

Proposition 165, Assembly Bill 671, the Governor's Budget as analyzed by the Legislative Analyst, and Senate Bill 366 did not become, and are not now, the law of

the State of California. They are not relevant legislative history for the statute at issue here which did become law in California.

The California Supreme Court was presented with a similar situation in the case of *Delaney v. Superior Court,* 50 Cal.3d 785 (1990). There, the court was called upon to determine the electorate's intent in passing a constitutional amendment by initiative which shielded a reporter from contempt proceedings in refusing to answer questions about unpublished information. Delaney, who was seeking the information, argued that the court should look to the legislative history of California Evidence Code section 1070 to determine the intent of voters in passing the Constitutional amendment. The court responded:

> The history, however, is of no help in that regard. Article I, section 2(b) is plain on its face, and we need not – indeed, should not – search for external indicia of voters' intent. Moreover, the *legislative* history of section 1070 could, as a matter of logic, reflect only the *Legislature's* intent. That history would not provide us with any guidance as to *the voters'* subsequent intent because none of the indicia of the Legislature's possible intent (committee analysis and digest and letters from the statute's author) were before the voters.

Id. at 801 (citation omitted) (footnote omitted).

Plaintiffs' analysis is even more absurd. They rely on materials regarding a failed amendment to the California Constitution and other legislative material which did not result in final legislation, to establish the intent of the California Legislature in passing section 11450.03. The

absurdity here is even more pronounced since the ballot materials and the legislative analysis of *unpassed* bills do not reflect any legislative intent.

Finally, section 11450.03 does not require resort to any materials for an understanding of its provisions. It means exactly what it says. None of plaintiffs' materials reflect applicable legislative history.

IV

CALIFORNIA'S STATUTE DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE

Although neither the trial court nor the Ninth Circuit Court of Appeals addressed this issue, plaintiffs contend that the statute violates the Privileges and Immunities Clause of Article IV of the United States Constitution by substantially interfering with the right to interstate migration. Plaintiffs primarily rely on *Zobel v. Williams*, 457 U.S. 55 (1982) as authority for their position that the statute violates the Privileges and Immunities Clause. Plaintiffs misread *Zobel*, as they rely entirely on Justice O'Connor's concurring opinion, in which no other justice joined. Justice O'Connor's viewpoint is not reflected in the opinion of this Court. In *Zobel*, this Court rejected a privileges and immunities claim against an Alaska statute by which the state distributed income derived from its natural resources to the adult citizens of the state in varying amounts based on the length of each citizen's residency, stating:

> The statute does not involve the kind of discrimination which the Privileges and Immunities Clause of Art. IV was designed to prevent. The

> Clause 'was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.'

Zobel, 457 U.S. at 60 n.5, citing *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

Cases which uphold the application of the Privileges and Immunities Clause to statutes that treat persons differently on the basis of state residency, such as *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Hicklin v. Orbeck*, 437 U.S. 518 (1978); *Toomer v. Witsell*, 334 U.S. 385 (1948); *Doe v. Bolton*, 410 U.S. 179 (1973); *United Building & Construction Trades Council v. Mayor*, 465 U.S. 208 (1984); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985); and *Austin v. New Hampshire*, 420 U.S. 656 (1975), all do so on the basis that an actual nonresident is involved. Cases which discuss the application of the Privileges and Immunities Clause, but do not uphold the application of it, such as *Baldwin v. Fish and Game Comm'n*, 436 U.S. 371 (1978) and *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868), also analyze the issue in terms of a distinction between residents and nonresidents. In contrast, this case involves only California residents.

A clear statement of the scope of the Privileges and Immunities Clause is found in *Toomer* in which the Court stated that the clause bars "discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." 334 U.S. at 396.

As with the state law at issue in *Zobel*, section 11450.03 does not discriminate between residents of California and residents of other states. In order to receive

cash aid in California, a person must be a resident of California. Welfare and Institutions Code section 11105. Therefore, the Privileges and Immunities Clause has no application to this case and does not afford grounds for invalidation of the statute.

CONCLUSION

California is attempting to bring innovative solutions to a pressing national concern – welfare reform. As part of an attempt to fix a program which works for neither the federal government, the states nor for the recipients, California, along with the federal government and many other states, are experimenting with a variety of changes to this country's welfare programs. The reasonable discretion of California to improve its welfare program has been stymied by unwarranted strict scrutiny review. As with other statutes involving the administration of public benefits, the constitutionality of section 11450.03 should be analyzed under the rational basis standard. Strict scrutiny is not the proper standard to be used because the right to travel is not penalized by operation of California's statute. At most, the only impact the statute has on the right to travel is remote and incidental.

This Court should reverse the judgment of the Ninth Circuit and remand this case with instructions that the preliminary injunction be dissolved.

Dated: December 28, 1998

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No. 98-97

In the Supreme Court of the United States

OCTOBER TERM, 1998

ELOISE ANDERSON, DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, ET AL., PETITIONERS

v.

BRENDA ROE AND ANNA DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS IN PART AND RESPONDENTS IN PART

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QUESTION PRESENTED

Section 404(c) of the Social Security Act, 42 U.S.C. 604(c) (Supp. II 1996), authorizes any State that receives a block grant under the federal program for Temporary Assistance for Needy Families (TANF) to "apply to a family the rules (including benefit amounts) of the [TANF] program * * * of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months." Section 11450.03 of the California Welfare and Institutions Code (West Supp. 1998) provides, in turn, that cash benefits paid by the State to "families that have resided in [California] for less than 12 months shall * * * not * * * exceed the maximum aid payment that would have been received by that family from the state of prior residence." The question presented is:

Whether Section 11450.03, as authorized by Section 404(c), impermissibly burdens an aid recipient's federal constitutional right to establish residence and citizenship in a new State.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS IN PART AND RESPONDENTS IN PART

INTEREST OF THE UNITED STATES

This case involves the constitutionality of a state statute of a type that Congress has specifically authorized States to enact in connection with their participation in the nationwide program of Temporary Assistance for Needy Families established and funded by Congress under the Social Security Act, 42 U.S.C. 601 *et seq.* (Supp. II 1996). The United States has a substantial interest in the proper analysis of the constitutional validity of such state laws.

STATEMENT

1. California has for many years participated in a variety of cooperative federal-state welfare programs that provide, among other benefits, cash grants to eligible families. Until 1996, such grants were provided primarily through the Aid to Families with Dependent Children (AFDC) program, under which the federal government provided States with funds for distribution, in combination with state funds, under state plans that were required to comply with detailed federal requirements and to

be approved by the Secretary of Health and Human Services. See 42 U.S.C. 601, 602(a)-(b), 603(a) (1994).

In 1996, as part of a comprehensive revision of various federally sponsored welfare programs, Congress replaced AFDC with a new program known as Temporary Assistance for Needy Families (TANF). Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, Tit. I, 110 Stat. 2110, enacting provisions codified at 42 U.S.C. 601 *et seq.* (Supp. II 1996).[1] Designed to "increase the flexibility of States in operating" programs to assist needy families while encouraging self-reliance and family stability, see 42 U.S.C. 601(a), the TANF program eliminates any individual entitlement to benefits (§ 601(b)), sets out certain common goals and general requirements (§§ 602, 607-608), and provides for block grants (§ 603) that participating States may generally use "in any manner that is reasonably calculated to accomplish the purpose[s] of" the federal program (§ 604(a)(1)). Thus, for example, a participating State is not required to provide any particular level of cash benefits (or, indeed, to provide cash benefits at all). Each State instead has broad discretion to use its TANF grant to provide whatever mix of cash payments, child care, job training, or other benefits it believes will most effectively advance the statutory goals of promoting the care of children in their own homes; encouraging parental self-sufficiency through job preparation, work, and marriage; reducing out-of-wedlock pregnancies; and encouraging the formation and maintenance of two-parent families. See 42 U.S.C. 601(a), 604.

Although most aspects of particular TANF-funded programs are left to the discretion of participating States, federal law imposes some specific requirements and conditions. With some exceptions, for example, States must require recipients to engage in "work activities" (including educational or job training programs) once the State determines they are "ready to engage in work," but no later than 24 months after they begin receiving benefits. See 42 U.S.C. 602(a)(1)(A)(ii)-(iii), 607(d). If a recipient fails to comply with applicable work requirements, his or her family's benefits may be reduced or terminated. See 42 U.S.C. 607(e), 608(b)(3). A State may also lose some of its federal grant if the percentage of adult welfare recipients engaged in work activities falls below minimum percentages. See 42 U.S.C. 607(a), 609(a)(3). In addition, a given family generally may receive federally funded assistance for no more than five years, whether in one State or in several. See 42 U.S.C. 608(a)(7). The level of the federal block grants provided to participating States is largely fixed through fiscal year 2002. See 42 U.S.C. 603(a).

Federal law also contains a number of specific authorizations relating to state use of TANF funds. In particular, as relevant here, the 1996 Act contains a specialized choice-of-law provision under which "[a] State operating a [TANF] program * * * may apply to a family the rules (including benefit amounts) of the [TANF] program * * * of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months." 42 U.S.C. 604(c). The plan a State submits to the Secretary must "indicate whether the State intends to treat families moving into the State from another State differently than other families under the program, and if so, how the State intends to treat such families under the program." 42 U.S.C. 602(a)(1)(B)(i). So long as the Secretary finds that a submitted plan "includes" all of the elements specified by the 1996 Act, however, the TANF program, unlike AFDC, does not require any further approval by the Secretary before a State becomes eligible for a TANF grant. Compare 42

[1] Unless otherwise noted, references to Title 42 of the United States Code are to the 1996 Supplement, reflecting the amendments made by PRWORA.

U.S.C. 602(a), 603(a)(1)(A) (Supp. II 1996) with 42 U.S.C. 602(b), 603(a) (1994).

2. In 1992, four years before Congress created the TANF program, California sought to undertake an experiment in welfare reform that would have included both a work incentive program (combining decreased cash aid with an increase in the amount of income that a recipient could earn without losing benefits) and a residency-based limitation, under which an otherwise eligible family could receive, for its first 12 months of residency in California, no more cash aid than the maximum that would have been paid by the AFDC program of the State where the family previously resided. See *Beno* v. *Shalala*, 30 F.3d 1057, 1060-1061 (9th Cir. 1994).[2] Because both aspects of the experiment would have violated requirements of the AFDC program, the State sought and received from the Secretary a waiver of inconsistent federal law and rules. See *id.* at 1061-1062; Pet. App. 46-48; see also 45 C.F.R. 233.40(a)(residency requirements), 233.20(a)(2)(iii) (uniform application throughout State).

A federal district court enjoined implementation of the State's residency limitation pending resolution of a suit brought by three individuals who sought AFDC benefits within 12 months of having established California residency, and who claimed that limitation of their benefits on that basis violated their rights to equal protection and to free interstate migration. *Green* v. *Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993). Relying on this Court's decisions in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974), and other cases,

[2] Section 11450.03 of the California Welfare and Institutions Code (West Supp. 1998) provides that otherwise eligible "families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with" the State's ordinary benefit formula, "not to exceed the maximum aid payment that would have been received by that family from the state of prior residence."

the district court held that California's residency limitation "must be invalid" because it "place[d] a penalty on the decision of new residents to migrate to the State and be treated on an equal basis with existing residents." 811 F. Supp. at 521. The court concluded that the State could advance no "compelling" governmental purpose for the limitation, that a purpose "to deter settlement into the state of persons who need welfare and seek a higher benefit" would be constitutionally impermissible, and that "[s]tripped of the unconstitutional purpose of deterring migration, the measure lack[ed] a rational design." *Id.* at 521-523.

The court of appeals affirmed the preliminary injunction in *Green* "for the reasons stated in the district court's order." *Green* v. *Anderson*, 26 F.3d 95, 96 (9th Cir. 1994). This Court granted certiorari, but it ultimately concluded that the case had become moot because of the intervening invalidation, on other grounds, of the Secretary's waiver of federal requirements on which California's ability to enforce its residency limitation depended under the AFDC program (and under California law). *Anderson* v. *Green*, 513 U.S. 557 (1995) (per curiam). The Court accordingly vacated the Ninth Circuit's judgment and ordered the case dismissed. *Id.* at 560.[3]

3. In August 1996, the President signed PRWORA. As discussed above, that Act replaces AFDC with TANF, and expressly authorizes any State that receives a TANF grant to apply to a family, during its first 12 months of residence in that State, the rules (including benefit amounts) of the TANF program of the family's prior State of residence. 42 U.S.C. 604(c); see also Pet. App. 16-17. That change removed any impediment under the Social Security Act to Cali-

[3] The Secretary later granted a new waiver to permit California to proceed with other aspects of its welfare-reform experiment, but she declined to renew the waiver that would have permitted implementation of the residency limitation imposed by Section 11450.03. See Pet. App. 16, 49-52.

fornia's again seeking to implement Section 11450.03. The TANF plan that California submitted to the Secretary noted, in accordance with Section 602(a)(1)(B)(i), the State's intention to apply such a limit on cash benefits, and the State instructed its administrators to begin implementing Section 11450.03 on April 1, 1997. See Pet. App. 7 n.3.

Respondents represent a class of benefit applicants who would be affected by California's implementation of Section 11450.03. See Pet. App. 7 & n.4. Respondent Roe was a resident of Oklahoma until early 1997, when she and her husband moved to Long Beach, California. *Id.* at 19. When she applied for TANF benefits, she was informed that, until she had been a California resident for 12 months, she would be limited to the Oklahoma grant level of $307 per month instead of a full California grant of $565. *Ibid.* Respondent Doe was a resident of Washington, D.C., until she moved to Los Angeles, where she became eligible for cash assistance in April 1997, at the six-month point of her pregnancy. *Ibid.* Doe was advised that she would temporarily receive cash benefits at the District of Columbia level of $330 per month rather than at the otherwise applicable California level of $456. *Id.* at 19-20.

The district court entered a preliminary injunction barring implementation of Section 11450.03. Pet. App. 13-31; see *id.* at 7-8, 20. After concluding that implementation of Section 11450.03 would lead to "disparities, even significant disparities, among California [benefit] recipients as between newcomers and recipients who have resided in the state for one year" (*id.* at 25), the court largely "adopt[ed] its discussion in *Green* of the Supreme Court's right of migration and equal protection cases" that "set aside as unconstitutional distinctions drawn among residents of a state—all of whom are bona fide residents—based on the incipiency or duration of their residency" (*id.* at 27). The court rejected the State's argument that "so long as the benefit provided to new residents of California is the same as that provided to

residents of their former states, there is no penalty on migration and no violation of equal protection." *Id.* at 28; see *id.* at 28-30. And although it recognized that Congress now considered a temporary benefit limitation "appropriate," the court observed that, "[f]acing a similar congressional permission in *Shapiro*," this Court had "held that 'Congress may not authorize the States to violate the Equal Protection Clause.'" *Id.* at 30. The court accordingly concluded that Section 11450.03 "must be found unconstitutional." *Ibid.*

The court of appeals affirmed. Pet. App. 1-12. Noting that it would not decide the case on the merits in reviewing the grant of a preliminary injunction (see *id.* at 4, 12), the court held that its previous affirmance in *Green* nonetheless remained "persuasive authority" (*id.* at 9), and it agreed with the district court that the passage of PRWORA could "not affect the constitutional analysis" (*ibid.*). Concluding that the "apparent purpose" of the challenged provision was "to keep poor people out of the state," the court was "satisfied" that respondents had "demonstrated a probability of success on the merits." *Id.* at 10. Like the district court, the court of appeals rejected the State's argument that a court should compare "the 'position of newcomers before and after travel to California,'" and it held that a benefit reduction, "even * * * of a relatively small magnitude," would "impose irreparable harm on recipient families." *Id.* at 10-11. The court accordingly concluded that the district court "did not abuse its discretion in granting the preliminary injunction." *Id.* at 11. The court declined to render any more definitive ruling "before the district court has had a chance to address the underlying merits upon a fully developed record." *Id.* at 12.

SUMMARY OF ARGUMENT

In comprehensively reforming the Nation's welfare system in 1996, Congress authorized each State participating in the TANF program to "apply to a family [receiving benefits] the rules (including benefit amounts) * * * of another State

if the family has moved to the State from the other State and has resided in the State for less than 12 months." 42 U.S.C. 604(c). Section 11450.03 of the California Welfare and Institutions Code, challenged by respondents in this litigation, is a residency-based restriction of the type facially authorized by Section 604(c).

The legislative history of the 1996 Act reveals that the federal authorization addresses at least two related concerns. First, Congress was concerned that the national welfare program itself might create real or perceived incentives to migrate between States—a concern that would have been particularly acute in the context of the new, highly decentralized TANF program, which was expected to lead to many variations in the specific programs implemented in different States. Those variations could produce both new incentives to move and new problems of interstate coordination, to which Congress could reasonably respond with a specialized choice-of-law-type provision allowing destination States to apply the benefit rules of origin States during a limited transition period. Second, Congress was concerned that, without some permission to impose such a transitional limitation, States might engage in a "race to the bottom" in setting the benefit levels in their TANF programs. That concern, too, was potentially exacerbated by the 1996 reforms.

The courts below determined that California's Section 11450.03 would likely be held unconstitutional under this Court's decisions in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), and other cases involving challenges to state legislation based on the freedom of interstate migration guaranteed by the federal Constitution. We agree that there is sufficient doubt concerning the constitutionality of Section 11450.03 to sustain the district court's entry of a preliminary injunction in this case. That court erred, however, to the extent it concluded (Pet. App. 30), at the outset of the proceedings in this case, that the California law "must" be struck down, without taking full account of Congress's affir-

mative authorization of the imposition of some limitations of this type in the unique context of a nationwide but decentralized federal welfare program.

Some of this Court's cases have held that particular lines drawn by state legislatures on the basis of length of state residency bore no rational relationship to any legitimate state purpose. Here, however, the statute at issue is one of a type that Congress has authorized the States to enact in a limited context, and the national governmental purposes that support that authorization would also support state legislation that fairly implements it. Those purposes are plainly legitimate from a national perspective, and at least some temporary limitations on benefits payable to new residents would be calculated to advance them.

In other cases, including *Shapiro*, the Court has applied strict constitutional scrutiny in striking down state legislation that classified state citizens on the basis of length of residency. We in no way question *Shapiro*'s invalidation of an absolute one-year ban on welfare eligibility. In our view, however, the constitutional calculus must change somewhat in the different and unusual circumstances of this case.

Here, Congress has considered and acted on a question affecting the freedom of interstate migration—a freedom that has special structural characteristics and is in important respects a right of national citizenship, as to which Congress stands in a different relation to individual citizens than do the legislatures of the several States. In structuring a decentralized national welfare program, Congress has authorized the States to adopt, not an outright bar on the receipt of benefits after an interstate move, but a temporary application of the benefit limits of the State of former residence—a sort of specialized choice-of-law rule. While of course Congress may not abrogate the right to travel, or "authorize" States to violate the Equal Protection Clause, judicial review of a state statute that purportedly implements Congress's express authorization must take full account of that federal

action. On the other hand, this Court's precedents set outside limits on what sorts of burdens may permissibly be imposed on the freedom to migrate; that freedom is not only a structural implication from the nature of the Union, but also an important personal liberty, and state laws that burden it should always merit more than minimal constitutional scrutiny; and the very purposes that support the congressional authorization in this case may also serve appropriately to limit its scope and constitutional effect.

In light of these considerations, we believe that the state statute at issue in this case should be subject to an intermediate level of constitutional review: It should be upheld if the State can demonstrate that the particular lines it has drawn in Section 11450.03 are substantially related to an important governmental objective. The premise for applying that test here is that Congress has specifically authorized a general type of state classification, and we think it clear that the goals of the congressional authorization—achieving interstate integration and coordination, preventing the distortion of incentives, and promoting the effectiveness of the federal program—are important ones. Thus, if the state statute implements the federal authorization, then the dispositive question will be whether the particular form of implementation selected by California is "substantially related" to those federal purposes.

The proper answer to that question is not clear on the present record. The fact that California's statute was enacted four years before Section 604(c), and its apparent overbreadth in relation to the relevant federal purposes, give rise to sufficient doubt concerning its constitutionality to support the district court's decision to enter a preliminary injunction. The judgment below should accordingly be affirmed. In further proceedings below, however, the State should be afforded the opportunity to show that Section 11450.03 in fact seeks to implement, and is substantially

related to achieving, the purposes underlying the federal statute.

ARGUMENT

I. Congress Authorized Individual States To Impose Some Temporary Benefit Limitations Based On Changes In State Residency When It Comprehensively Reformed The Nation's Welfare Laws In 1996

A. By enacting PRWORA, Congress sought to "put[] in place the most fundamental reform of welfare since the program's inception." H.R. Conf. Rep. No. 725, 104th Cong., 2d Sess. 261 (1996). As we have explained (see pp. 2-4, *supra*), the Act eliminated the familiar program of individual AFDC "entitlements" and replaced it with a new program based on block grants, subject to limited federal requirements, that was intended to "restore[] the States' fundamental role in assisting needy families." *Ibid.* In signing the Act, the President described it as bipartisan legislation that provided "an historic opportunity to end welfare as we know it and transform our broken welfare system by promoting the fundamental values of work, responsibility, and family." 32 Weekly Comp. Pres. Doc. 1487-1488 (Aug. 26, 1996).

In setting the limited federal parameters for its new program of Temporary Assistance for Needy Families, Congress specifically considered the question of temporary benefit limitations based on changes in state residency. In 42 U.S.C. 604(c), it specified that in operating a TANF program a State might "apply to a family the rules (including benefit amounts) of the [TANF] program * * * of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months." That provision on its face imports a general authorization to impose temporary benefit differentials of the sort established by California's Section 11450.03.

The nature and purpose of that authorization are clarified by PRWORA's legislative history. The House Budget Com-

mittee's report noted both that existing law "forb[ade] the Secretary to approve a plan that denies AFDC eligibility to a child unless he ha[d] resided in the State for 1 year" (see 42 U.S.C. 602(b) (1994)) and that this Court had "invalidated some State laws that withheld aid from persons who had not resided there for at least 1 year." H.R. Rep. No. 651, 104th Cong., 2d Sess. 1337 (1996). The report went on to observe, however, that the Court "has not ruled on the question of paying lower amounts of aid for incoming residents." *Ibid.*; see also H.R. Conf. Rep. No. 725, *supra*, at 272-273. The report then explained Congress's reasons for enacting Section 604(c):

> States are allowed to pay families who have moved from another State in the previous 12 months the cash benefit they would have received in the State from which they moved because research shows that some families move across State lines to maximize welfare benefits. Furthermore, States that want to pay higher benefits should not be deterred from doing so by the fear that they will attract large numbers of recipients from bordering States.

H.R. Rep. No. 651, *supra*, at 1337.

B. 1. From this discussion, including the reference to "the question of paying lower amounts of aid for incoming [state] residents," it seems clear that Congress was aware of this Court's decision in *Shapiro* v. *Thompson* and the Court's inconclusive consideration, only the year before, of the very California statute that is again at issue in this case. See *Anderson* v. *Green*, *supra*.[4] Notwithstanding acknowledged

[4] In letters presenting its views on earlier versions of the legislation eventually enacted as PRWORA, the Department of Justice specifically directed Congress's attention to *Shapiro*, *Green*, and other cases, commenting that "[u]nless and until the Supreme Court revisits this issue, courts applying this case law are very likely to hold unconstitutional state laws passed pursuant to the[] provisions of the bills" now codified at 42 U.S.C. 602(a)(1)(B)(i) and 604(c). See Letter from Andrew Fois, Assistant Attorney General for Legislative Affairs, to the Hon. Robert Dole, Majority Leader, United States Senate 2-3 (Nov. 9, 1995).

uncertainty concerning the scope of applicable constitutional constraints, Congress determined that it was desirable, as a matter of federal statutory welfare policy, to authorize each participating State to adopt at least some form of temporary limitation on the benefits made available to new state residents, should the State deem it necessary to do so in designing its own system of benefits within the federal TANF program.

As the explanation offered by the House Report makes clear, at least two related grounds underlie that congressional judgment. First, Congress was concerned that "some families move across State lines to maximize welfare benefits." H.R. Rep. No. 651, *supra*, at 1337. Because Congress was fashioning a national social welfare program that would, nonetheless, depend heavily for its success on the full and committed participation of the several States, it could properly be concerned to avoid having that federal program introduce real or perceived distortions into the ordinary patterns of interstate migration that would have prevailed in the absence of federal intervention. See, *e.g.*, *States' Perspective on Welfare Reform: Hearing Before the Senate Comm. on Finance*, 104th Cong., 1st Sess. 9 (1995) (statement of Sen. Graham) (noting that one argument in favor of completely federalizing the welfare program was that "with unequal standards, you could create incentives for populations to move from one State to another in order to access the higher benefits. * * * That is not in the nation's interest to be trying to stimulate that kind of population movement.").

That concern would have been particularly acute in the context of the new TANF block grants, which were designed to encourage experimentation by the States and therefore

could lead to a high degree of variation among state anti-poverty programs. Because TANF programs will typically be more complex than simple cash grants to needy families, featuring a mixture of benefits (such as child care and job training) and incentives (such as time limitations on the availability of benefits) designed to move recipients into the workforce, they may become significantly more difficult to implement successfully as the population receiving assistance becomes more transient. Because TANF programs will also typically demand from each recipient a substantial commitment to work toward bettering his or her own situation (see, *e.g.*, 42 U.S.C. 608(b), which allows States to require recipients to sign "individual responsibility plan[s]" and to reduce benefits for noncompliance), the varying state aid-and-incentive structures encouraged by the federal block-grant program could also produce new incentives for interstate relocation on the part of recipients who might seek to avoid those new responsibilities or otherwise to take advantage of the variable rules operative in different jurisdictions. A benefit recipient's movement from State to State within the federal program could also raise choice-of-law considerations, because Congress could reasonably determine that the standards applicable to the recipient in the State where he or she was previously receiving benefits need not be disregarded for purposes of continued participation in the overall federal program as implemented by the destination State, at least for a limited transition period.[5]

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[5] Under TANF, for example, States A and B might each have a limited portion of the federal grant—for purposes of illustration, say $100—available to commit, over time, to providing cash aid to help move any one recipient from welfare to work. State A might adopt a program that provides relatively high cash benefits for a relatively short time—say $50 per year for two years—so as to free recipients to focus on job training, while giving them an incentive to move quickly toward independence. State B might adopt a different approach, providing lower cash benefits but for a longer period of time—say $25 per year for four years. While the real-world variables are obviously complex, a recipient who sought to maximize cash benefits would have some incentive to reside in State A for two years, collecting a full $100 and exhausting eligibility under the State's program, and then to move to State B for the succeeding two years, collecting another $50. Free mobility from one state program to the next within the overall federal program would thus both (i) reduce the intended incentive effect of State A's time limit and (ii) allow the recipient to receive still further funds from State B (and, indirectly, from the federal taxpayer) under that State's lengthier pay-out period. For present purposes, the most important point is that the incentive to move would have been unintentionally but effectively *created* by the decentralized structure of the federal program, which not only allowed, but encouraged, States A and B to adopt different program approaches.

Finally, in its effort to encourage the development of new and effective ways to break the cycle of long-term welfare dependency, Congress in PRWORA chose to eliminate any individual entitlement to benefits and to give the States specific incentives by providing them with stable but generally *non-increasing* annual grants for an extended period. See 42 U.S.C. 603(a) (fixing grant levels through 2002); H.R. Rep. No. 651, *supra*, at 1332 (system "provides States with an incentive to help recipients leave welfare because, unlike [under the AFDC program], States do not get more money for having more recipients on the welfare rolls"); see also 42 U.S.C. 607(a), 609(a)(3) (authorizing reduction of State grants if percentage of adult welfare recipients engaged in work activities falls below specified percentages). In short, much of the thrust of the 1996 Act was to give both the States and welfare recipients themselves the ability and responsibility to address the issue of moving needy families from welfare to work. In the context of that effort, it was reasonable for Congress to seek, through a specialized choice-of-law provision, to mitigate incentives for interstate migration, and to accommodate the interests of various States and the federal government, that stem from the decentralized structure of the TANF program itself.

2. The second, and related, reason set out in the legislative history for authorizing States to impose temporary residence-related benefit limitations is that "States that want to pay higher benefits should not be deterred from doing so by the fear that they will attract large numbers of recipients from bordering States." H.R. Rep. No. 651, *supra*, at 1337. That statement expresses concern over a phenomenon often referred to as the "race to the bottom": In a system in which (i) each State sets its own benefit levels, (ii) the State's total resources available for welfare benefits are limited, and (iii) there is no restriction on interstate migration, each State has some incentive to set its benefit level at or below the level selected by every other State, so as to avoid attracting an influx of benefit-eligible migrants. See, *e.g.*, Zubler, *The Right to Migrate and Welfare Reform: Time for Shapiro v. Thompson to Take a Hike*, 31 Val. U. L. Rev. 893, 929-939 (1996); see also *States' Perspective on Welfare Reform*, *supra*, at 9 (statement of Sen. Graham) (suggesting concern that a State might also have an incentive to reduce its benefit level below the level in other States in order to encourage emigration of benefit recipients).

On this model, no State is necessarily motivated by an invidious desire to "fence out" the poor. Rather, from the State's perspective, it is unfortunate but evident that, although each needy immigrant may act on the expectation that the State's present (relatively high) benefit level will continue to be available after his move, the inevitable effect of many such individual choices to immigrate, over a limited time, will be to depress the level of benefits the State can pay to each recipient using a given level of resources. Conversely, allowing the imposition of limited restrictions that have the effect of eliminating or mitigating any given individual's perceived incentive to move in search of higher benefits may, paradoxically, increase not only the stability of the system, but also the average level of benefits offered by

States throughout the program (if the promise of stability encourages States to commit greater resources to the program, or to set and maintain higher benefit levels on the expectation that they will prove sustainable, over time, within the limits of the State's resources).

As in the case of other incentives to move potentially created by the federal welfare benefits program, this race-to-the-bottom concern may have been exacerbated by the 1996 reforms. Unlike AFDC, in which federal payments to a State were generally based on the number of benefit recipients within the State in any given period, thus offsetting a substantial portion of the additional cost to the State of any welfare-eligible immigrant, TANF bases the amount of state grants on a base period and generally provides for no increase in the commitment of federal funds over an extended period. See 42 U.S.C. 603(a)(1). The new program thus significantly increases the degree to which the amount available to a State for the payment of cash benefits is fixed, and correspondingly increases the effect on average sustainable benefit levels of the arrival of any new benefit recipient. Particularly in light of that change introduced by PRWORA, it was reasonable for Congress to address the race-to-the-bottom problem that might be *caused* by the existence of variable state benefit programs by authorizing individual States to include in their programs, should they feel the need to do so, some temporary restrictions on a new resident's ability to receive welfare benefits more generous than those provided by his or her former State.

It is important to observe, however, that Congress's action in this regard is permissive, not mandatory, and that the federal authorization, although it sets some limits on the restrictions a State may impose, does not purport to specify what particular limitations may be appropriate in the context of a particular state program. Those characteristics of the federal action are consistent with PRWORA's overall approach of establishing relatively general federal para-

meters for the TANF program and leaving individual States substantially free to design their own benefit programs in accordance with local conditions and legislative judgments. Moreover, like all legislation, the federal authorization is bounded to some extent by the purposes that underlie it. For those reasons, Congress's general decision to authorize some residency-based benefit limits does not resolve—although, as we explain below, it is highly relevant to—the question whether any particular benefit restriction adopted by a State pursuant to that authorization falls within the independent limits imposed on the State's action by the federal Constitution.

II. The Particular Benefit Restriction Imposed By California Must Be Examined To Determine Whether It Is Substantially Related To The National Governmental Purposes That Underlie Congress's General Authorization Of Such Limitations In The Context Of The TANF Program

The courts below determined that California's Section 11450.03 would likely be held unconstitutional on the basis of this Court's decisions in *Shapiro* v. *Thompson* and other cases involving state laws challenged as impermissibly burdening "the constitutional right to travel, or, more precisely, the right of free interstate migration." *Attorney General* v. *Soto-Lopez*, 476 U.S. 898, 902 (1986) (plurality opinion); see Pet. App. 9-10, 26-30. That position has considerable force. Through Section 11450.03, the State seeks to treat some of its citizens differently from others solely on the basis of how recently they became residents of the State. This Court's cases make clear that any state classification drawn on that basis is constitutionally problematic. See, *e.g.*, *Soto-Lopez*, 476 U.S. at 902-905 (plurality opinion) (describing previous cases).

Although we think that the doubt concerning Section 11450.03's constitutionality is sufficient to sustain the district

court's entry of a preliminary injunction, we agree with the State that the district court erred in concluding (Pet. App. 30), at the outset of the present proceedings, that Section 11450.03 "must" be held unconstitutional. Because Congress has affirmatively authorized the imposition of some limitations of this type in the context of the nationwide, federally funded TANF program, the constitutional question in this case cannot be properly resolved without a serious examination of whether the particular limitation adopted by California is sufficiently tailored so that it may fairly be regarded as "substantially related" to the national governmental interests furthered by that authorization. While we question whether the California provision, enacted four years before PRWORA, will be able to satisfy that standard, the State should have the opportunity to demonstrate that it does.

1. In some cases, this Court has held that particular lines drawn by state legislatures on the basis of length of residency in the State simply bore no rational relationship to any legitimate state purpose. See *Zobel* v. *Williams*, 457 U.S. 55, 61-64 (1982); *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612, 618-623 (1985); see also *Soto-Lopez*, 476 U.S. at 912-916 (Burger, C.J., concurring in the judgment), 916 (White, J., concurring in the judgment). The same might be true in this case if, as the lower courts essentially assumed, Section 11450.03 reflected nothing more than a unilateral State purpose "to deter migration of poor people to California." Pet. App. 9; see *Shapiro*, 394 U.S. at 631; compare *Romer* v. *Evans*, 517 U.S. 620, 631-636 (1996); *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446-447 (1985) ("[S]ome objectives—such as 'a bare . . . desire to harm a politically unpopular group,'—are not legitimate state interests.") (citation omitted). It is not, however, appropriate simply to assume such an impermissible purpose with respect to a state statute that falls within the express authorization in 42 U.S.C. 604(c).

Unlike the state laws at issue in the Court's prior cases (including *Shapiro*, see 394 U.S. at 638-640), Section 11450.03 is a provision of a type that Congress has clearly authorized States to enact in the specific context of their participation in a nationwide but decentralized federal benefits program. That distinction is critical, because the national governmental purposes that support 42 U.S.C. 604(c) would also serve to support state legislation that fairly implements it. Compare Pet. App. 9, 30 (dismissing the enactment of PRWORA as irrelevant). Those federal purposes—avoiding the creation, through a federal program, of distorted incentives for interstate migration by benefit recipients; addressing the unique choice-of-law considerations that may reasonably be deemed to arise when a participant in one State's implementation of the federal program moves to another State with different rules; and mitigating any tendency, in such a program, toward a "race to the bottom" in the State-by-State establishment of benefit levels—are plainly legitimate, even though it may be doubted that an individual State, pursuing only its own interests, would ever have valid reasons for distinguishing new citizens from old in allocating benefits under a program designed and funded solely by the State. And the imposition by a State of some temporary limitation on benefits payable to new residents, as authorized by Section 604(c), is reasonably calculated to advance those national ends.[6]

---

[6] The ultimate strength of the connection between ends and means largely depends, of course, on the proposition that individuals are or may be influenced in their decisions about interstate migration by the perceived availability of higher welfare benefits in a destination State. Although respondents dispute that proposition as an empirical matter (see, *e.g.*, Pet. App. 23-24), there is some evidence to support it. See *id.* at 25 (citing P. Peterson & M. Rom., *Welfare Magnets* (Brookings Inst. 1990)); Zubler, 31 Val. U. L. Rev. at 933-939; Moffitt, *Incentive Effects of the U.S. Welfare System: A Review*, 30 J. Econ. Lit. 1, 34 (1992). In the case of a judgment made by Congress in fashioning an integrated national program of state participation like TANF, we do not believe that more is required to support the governmental interest. *Cf. Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 665 (1994) ("Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable."); *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313-315 (1993).

2. In other cases, including of course *Shapiro*, the Court has invalidated state classifications akin to that drawn in Section 11450.03 on the ground that they unduly burdened the federal constitutional right of citizens of the United States "to enter and abide in any State in the Union." *Dunn* v. *Blumstein*, 405 U.S. 330, 338 (1972); see *Soto-Lopez*, 476 U.S. at 901-913 (plurality opinion); *Memorial Hosp.* v. *Maricopa County*, 415 U.S. 250 (1974); *Shapiro*, *supra*; see also *Zobel*, 457 U.S. at 65-71 (Brennan, J., concurring); *Hooper*, 472 U.S. at 624 (same). In *Shapiro* and *Dunn*, the Court indicated that "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." *Shapiro*, 394 U.S. at 634; see *Dunn*, 405 U.S. at 338-343. As the Court subsequently observed, however, although "any durational residence requirement impinges to some extent on the right to travel," some such impingements may not rise to the level of "penalties"; and the Court's cases have not made entirely clear "[t]he amount of impact required to give rise to the compelling-state-interest test." *Memorial Hosp.*, 415 U.S. at 256-257, 258-259; see also *Soto-Lopez*, 476 U.S. at 903-906 & n.5 (plurality opinion); *id.* at 921 (O'Connor, J., dissenting); *Sosna* v. *Iowa*, 419 U.S. 393 (1975) (upholding durational residency requirement for invoking jurisdiction to obtain divorce, without expressly addressing applicable standard of review); *Vlandis* v. *Kline*, 412 U.S. 441, 452-453 & n.9 (1973) (acknowledging permissibility of

reasonable durational residency requirements to establish entitlement to in-state tuition at public university).[7]

We in no way question the correctness of *Shapiro*'s holding that an absolute one-year bar on welfare eligibility was unconstitutional. Nor do we believe there is any occasion in this case to reconsider the rationale of *Shapiro* or subsequent cases addressing durational residency requirements that are adopted by the State on the basis of state authority alone, to identify a single source in the Constitution for the freedom of interstate migration, or to articulate an overarching theory for resolving the constitutionality of all state measures that are alleged to burden that freedom. For in our view the constitutional calculus must change somewhat in the unusual circumstance in which Congress has considered a question affecting the right of interstate migration, in the unique context of structuring a decentralized national welfare program, and has authorized the States to adopt not an outright bar, but rather a specialized choice-of-law rule that calls for application of the laws of the prior State of residence for a limited transitional period.

That federal authorization is of central importance in part because the freedom of interstate migration reflects both the national interest in interstate commerce (see *Edwards* v.

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[7] In recent cases, some Justices have suggested that claims based primarily on the right of interstate migration should be evaluated under the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution. *Zobel*, 457 U.S. at 71-81 (O'Connor, J., concurring in the judgment); see also *Soto-Lopez*, 476 U.S. at 918-925 (O'Connor, J., joined by Rehnquist and Stevens, JJ., dissenting); *id.* at 916 (White, J., concurring in the judgment). On that analysis, a State may not draw any legislative distinction on the basis of an individual's exercise of the "fundamental" right "to establish residence in a new State" unless (i) there is "something to indicate that non-citizens [including the new residents affected by the challenged classification] constitute a peculiar source of the evil at which the statute is aimed," and (ii) there is "a 'substantial relationship' between the evil and the discrimination practiced against the noncitizens." *Zobel*, 457 U.S. at 76-77 (O'Connor, J., concurring in the judgment).

California, 314 U.S. 160, 172-173 (1941)), which Congress has express power to regulate (U.S. Const. Art. I, § 8, cl. 3), and the nature of a national Union, as opposed to a federation of independent States. Congress's authorization is also important because insofar as interstate migration is a fundamental personal right (in addition to a structural attribute of national union), it is in important respects a right of national citizenship, as to which Congress stands in a different relation to individual citizens than do the legislatures of the several States. See, *e.g.*, *Soto-Lopez*, 476 U.S. at 902 (plurality opinion) (noting "the important role that principle has played in transforming many States into a single Nation"); *Zobel*, 457 U.S. at 73 (O'Connor, J., concurring); *Passenger Cases*, 48 U.S. (7 How.) 282, 492 (Taney, C.J., dissenting) ("For all the great purposes for which the Federal government was formed, we are one people, with one common country."); cf. *Edwards*, 314 U.S. at 173 (Of the limits on State legislation, "none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders.").

The form in which Congress has acted—by authorizing a specialized choice-of-law rule, rather than an outright ban—is also significant. In the first place, under that approach (unlike in *Shapiro*), there is a built-in assurance that a person who relocates to a new State ordinarily will not receive lower cash benefits by reason of relocating to a new State. More fundamentally, under a national program such as TANF, Congress may reasonably determine, for example, that when a family was receiving TANF benefits in another State, that State retains a sufficient connection to the family's continued receipt of benefits under the federal program that its law may properly be taken into account by the destination State during a transition period. In such circumstances, Congress determined, a destination State might

provide that the family would not become fully eligible under its laws until after completion of the one-year period of transition. Compare *Sosna*, 419 U.S. at 404-410. Ordinarily, of course, there would be little or no justification for one State, in the administration of its own public benefits laws, unilaterally to apply the standards of *another* State's laws. See *Restatement (Second) of Conflict of Laws* § 9, cmt. g (1971); compare *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 814-823 (1985). But where a decentralized benefit program is established and funded by the federal government, Congress may reasonably determine that the laws of more than one State may be relevant when a person who is eligible for benefits in one State moves to another State. As we have explained (see p. 14 & n.5, *supra*), the effectiveness of the TANF program depends in part on mutual commitments made by participants and the States. The special choice-of-law rules authorized by Section 604(c) can serve to reenforce the effect of such commitments made in the State of origin by giving some temporary continuing effect to that State's laws in the destination State. Section 604(c) therefore furthers purposes recognized by the Full Faith and Credit Clause of the Constitution (Art. IV, § 1), which grants Congress power to prescribe certain rules for giving effect in one State to the "public Acts" of another.

We do not suggest that Congress may "authorize the States to violate the Equal Protection Clause" (*Shapiro*, 394 U.S. at 641), or that the right to travel may be "eliminated by Congress" (*Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 277 n.7 (1993)). Plainly neither proposition is supportable. There is, however, a salient difference, in this regard, between state legislation that is purely local in character and imposes a flat bar to eligibility, as in *Shapiro*, and state choice-of-law legislation that seeks to implement a national policy, related to interstate commerce and the incidents of national citizenship, that Congress has explicitly articulated in the federal law that creates a nationwide benefit

program.[8] When a State acts unilaterally, there is a risk that it seeks to limit the allocation of its resources in ways that may properly be condemned as parochial and based on a desire to exclude persons from out-of-State. That risk is substantially lessened when Congress acts, because Congress represents, by definition, all citizens of the United States. Moreover, as we have suggested, the creation of a decentralized welfare program may also create both new incentives for movement and new problems of how to determine what rules should apply when an individual moves from program to program within the system—issues that Congress must be able to address if they are to be addressed at all under our Constitution. Thus, when Congress acts to structure and protect a nationwide program, in which it wishes to enlist the willing cooperation of the several States, a court should not lightly hold that state action implementing the multistate aspects of that program, under an express congressional authorization, impermissibly burdens a right of interstate migration that has at its core a concept of national citizenship, and that presupposes the existence of a Union and a Government of the United States in which Congress has the legislative power.

The rationale for taking account of congressional authorization in this context also suggests, however, limits to the principle. First, severe deprivations of the sort that this Court has already held impermissibly burden the freedom of interstate migration, such as a State's complete (even if temporary) denial of all welfare benefits to new residents because of their recent arrival, as in *Shapiro*, or of any abil-

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[8] There is accordingly no occasion here to reconsider the Court's statement in *Shapiro*, 394 U.S. at 641, that the state laws at issue in that case, which imposed a flat one-year bar to eligibility on all new residents, would be unconstitutional even if, contrary to the Court's actual reading of federal law (394 U.S. at 638-640), the version of 42 U.S.C. 602(b) then in effect had affirmatively authorized that bar.

ity to exercise the right to vote, as in *Dunn*, would presumably remain subject to strict scrutiny even if they had been specifically authorized by Congress. Second, the right to change state citizenship is an important personal liberty, and a state law that substantially burdens that right will always warrant more than minimal constitutional scrutiny, even if it has been authorized by Congress. Finally, the effect of any legislative action, including a congressional authorization, is appropriately limited, to some extent, by the purposes that underlie it. When, as in PRWORA, Congress delegates to the States substantial authority to implement an overall federal program in State-specific ways, it necessarily does so in relatively general terms. Accordingly, although it is appropriate to recognize that a State that legislates pursuant to a specific federal authorization is acting in part on behalf of national interests, when an individual alleges that the State has unduly burdened the right to migrate, it is also appropriate for a court to assure itself that the State's action is designed—and sufficiently tailored—to serve the purposes of the federal authorization.

In light of these considerations, we believe a state statute that does not clearly impose a burden of the sort that was held impermissible under *Shapiro* and subsequent cases, and that implements a specific congressional authorization within the context of a decentralized federal program, should be subject to an intermediate form of constitutional review. That degree of heightened scrutiny is normally described as requiring that a statutory classification be "substantially related to an important governmental objective." *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988). Because the premise for applying less-than-strict scrutiny in this class of cases is that Congress has specifically authorized a general type of state classification, it should normally be clear, as we think it is here, that the goals of achieving interstate integration and coordination, preventing the distortion of incentives, and promoting the effectiveness of the federal program are important ones. Accordingly, the dispositive question will normally be whether a State's particular implementation is "substantially related" to the purposes of the federal authorization. That inquiry will generally focus on whether the State's chosen means are sufficiently tailored so as to promote the supporting important federal governmental ends, without unreasonably burdening the affected class's individual right of interstate migration.[9]

3. In this case, the burden that Section 11450.03 imposes on respondents is not one that the Court's prior cases have clearly identified as sufficient to constitute a "penalty" on the right to migrate. Unlike the eligibility waiting-period struck down in *Shapiro*, California's limitation on benefits for new arrivals does not completely bar eligible new residents from receiving welfare benefits. Rather, it adopts a specialized choice-of-law rule that calls for the application of the law of the recipient's prior State of residence with respect to one aspect of the benefit determination—the amount of cash benefits to be paid. It follows as well that all families that are otherwise eligible under the California TANF program will receive some level of benefits. Even

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[9] Under the Privileges and Immunities Clause analysis discussed in note 7, *supra*, the federal purposes of the general congressional authorization in Section 604(c) could presumably be attributed to the State for purposes of determining that non-residents, or new residents, are a "peculiar source" of the problem that a State's legislation seeks to address. *Zobel*, 457 U.S. at 76 (O'Connor, J., concurring in the judgment). The additional inquiry suggested in the text, concerning how well the State's particular benefit limitation serves the purposes of the federal authorization, would be essentially the same as the second inquiry under the Privileges and Immunities test—whether there is a "substantial relationship" between that problem and the discrimination at issue. *Ibid.*; see also, *e.g.*, *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274, 284 (1985) ("The [Privileges and Immunities] Clause does not preclude discrimination against nonresidents where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective.").

that limitation may, of course, cause hardship in individual cases; but the California provision on its face does not completely "den[y] welfare aid upon which may depend the ability of the [recipient] families to obtain the very means to subsist." *Shapiro*, 394 U.S. at 627; see also *Memorial Hosp.*, 415 U.S. at 269. Nor does this case, like *Dunn*, involve even the temporary deprivation, on the basis of interstate migration, of the ability to exercise another fundamental right. And nothing in Section 11450.03 creates a class of state residents whose rights are permanently inferior to those of longer-term inhabitants, as could be said of the employment-preference, tax-benefit, and revenue-sharing schemes the Court struck down, on a rational-basis analysis, in *Soto-Lopez*, *Hooper*, and *Zobel*. In light of Congress's authorization, this case is therefore an appropriate one in which to apply intermediate rather than strict scrutiny.

The district court accordingly erred in concluding that Section 11450.03 "must" be unconstitutional (Pet. App. 30), because it reached that conclusion without acknowledging the importance of the federal authorization contained in 42 U.S.C. 604(c), and without evaluating whether the California provision is sufficiently tailored to be "substantially related" to the advancement of Section 604(c)'s purposes. The proper answer to that inquiry is not, in our view, clear on the present record. California's benefit limitation was first enacted four years before Congress enacted Section 604(c), and it appears to be overbroad as a means of addressing the federal purposes of eliminating distorted incentives, accommodating choice-of-law issues created by the federal program, and preventing a "race to the bottom." So far as appears, the State has made no effort to limit the application of its rule to categories of recipients who are most likely to have moved in search of higher or additional federal benefits. The State's provision is not, for example, limited to applicants who were receiving TANF benefits in their prior State of residence at the time they moved, the situation in which the choice-of-law

rationale for the limitation most readily applies. See pp. 23-24, *supra*; Pet. App. 17-18 (describing State's implementation of Section 11450.03). Nor does the State appear to grant any categorial exemptions from its rule for applicants who, for example, moved to California to accept job offers, but became unemployed after a period of work; or, alternatively, to allow any applicant an opportunity to receive an exemption from the across-the-board limitation by making an individualized showing that he or she did not come to California for the purpose of seeking higher (or any) welfare benefits. *Ibid.*[10]

The apparent overbreadth of Section 11450.03 in relation to the national purposes behind Section 604(c) raises a substantial question about its constitutionality under intermediate scrutiny. Because the balance of harms in this case also appears to favor respondents (see Pet. App. 10-11, 30-31), the court of appeals correctly concluded that the district court did not abuse its discretion in entering a preliminary injunction. That was the only issue resolved by the judgment below, see *id.* at 11-12, and that judgment should accordingly be affirmed. In further proceedings in the district court, however, the State should be afforded the opportunity to demonstrate that its benefit restrictions are substantially related to the purposes of the federal authorization—perhaps, for instance, because they are in fact better tailored than they appear, or perhaps because the costs of administering any more discriminating rule would be prohibitive. In any event, before entering its final judgment the district court should evaluate, on the basis of the record

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[10] At least one state has made an effort to tailor its durational residency limitation more narrowly to support the relevant federal statutory goals. Illinois limits the TANF benefits payable to an applicant who has resided in Illinois for fewer than 12 months to those payable by the State of prior residence, but only if the applicant received aid in the prior State at any time within 12 months of becoming a resident of Illinois. 305 Ill. Comp. Stat. Ann. 5/11-30 (West 1993).

presented by the parties, whether Section 11450.03 is substantially related to the important national purposes that underlie Congress's enactment of 42 U.S.C. 604(c).[11]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[11] Intermediate scrutiny requires not only an inquiry into the "substantial relationship" between the legislative purpose and its restrictions, but also a demonstration that the legislation is designed to achieve an important goal. For state statutes that are expressly intended to implement the TANF program, we believe the congressional findings and purpose that underlie Section 604(c) should ordinarily satisfy the "purpose" inquiry with respect to the implementing state statute—at least in the absence of convincing proof that the state legislature in fact acted with another, impermissible purpose. In the unique circumstance of this case, where the California statute was enacted four years before PRWORA, that state statute plainly could not have been enacted specifically to implement the federal statute. Accordingly, respondents should not be foreclosed from attempting to demonstrate that California in fact enacted Section 11450.03 solely for the invidious purpose of discouraging poor people generally from settling in the State, rather than for the permissible purpose of implementing the goals now reflected in the national program.

(11)

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Supreme Court of the United States

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ELOISE ANDERSON, Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; and CRAIG L. BROWN, Director, California Department of Finance,

Petitioners,

v.

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit, public interest legal center committed to defending the essential foundations of a free society and securing greater protection for individual liberty. The Institute has a particular interest in securing the natural rights and liberties of citizens of the United States and removing unlawful barriers to the pursuit of an economic livelihood. Counsel of record for the Institute's brief is Professor Douglas W. Kmiec, a leading scholar of constitutional law, who previously served as Principal Deputy and Assistant Attorney General of the United States, Office of Legal Counsel, U.S. Department of Justice during the years 1985-89.

SUMMARY OF ARGUMENT

The California statute should be sustained, and the Ninth Circuit decision reversed. The Court's rationale in *Shapiro v. Thompson*, 394 U.S. 618 (1969), has no basis in constitutional text or history and should be discarded. There is a fundamental right to migrate. It is secured by the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment. This fundamental right is one of the general, natural rights promised to all citizens of the United States. The existing privileges and immunities jurisprudence of this Court depends upon a careful

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[1] In conformity with Supreme Court Rule 37, the Institute for Justice has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk. The Institute also states that counsel for a party did not author this brief in whole or part; and that no persons or entities other than *amicus*, its members, and its counsel made a monetary contribution to the preparation and submission of the brief.

judicial identification of "those 'privileges' and 'immunities' bearing on the vitality of the Nation as a single entity." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279 (1985) (citing *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371, 383 (1978)). That jurisprudence is necessarily supplemented by this Court's modern recognition that the discernment of broad constitutional language like that in Article IV and the Fourteenth Amendment requires reference to the traditions and history of the Nation most frequently identifiable in the common law.

Under the rule of law of our Constitution, the Justices of this Court are neither free to create fundamental rights at will, as the Court did in *Shapiro*, nor disregard textual fundamental rights like those encompassed in the Bill of Rights or those additional privileges and immunities protected by Article IV, such as the right to migrate to a new state to pursue a lawful occupation. Should this Court decide to reverse the Ninth Circuit, as we believe the Constitution as written warrants, care must be taken not to disregard either aspect of the Court's Article III duty.

Respondents' claim that they possess a fundamental right to increased welfare benefits solely as a result of migration is premised upon over-broad constitutional improvisation. It has mooring in neither constitutional text nor common law tradition, and should be rejected. California has ample rational basis to sustain its welfare structure premised upon the empirical studies of so-called "welfare magnetism." Such welfare-induced migration threatens to undermine the welfare system through either an inundation of new claimants overwhelming state resources or a defensive lowering of benefits resulting in a "race to the bottom" adversely affecting all potential claimants. California is attempting

to avoid these consequences with a two-tier welfare structure that maintains a new resident's prior assistance level for one year and increases it to the usually higher California levels thereafter. Whether or not the two-tier structure is the best policy choice, it surely is a reasonable one for California to pursue.

ARGUMENT

I. THE RIGHT TO MIGRATE IS A PRIVILEGE AND IMMUNITY GUARANTEED UNDER ARTICLE IV AND THE FOURTEENTH AMENDMENT.

Article IV, Section 2 of the Constitution provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Supreme Court declined to locate the right to migrate, including the right to travel, in any particular clause of the Constitution. However, as Justice O'Connor first observed in *Zobel v. Williams*, 457 U.S. 55 (1982), and later reaffirmed in *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986), where she was joined by Chief Justice Rehnquist and Justice Stevens:

> the Privileges and Immunities Clause of Art. IV, § 2, of the Constitution supplies the relevant basis for analysis in evaluating claims . . . where the principal allegation is that the state scheme impermissibly distinguishes between state residents, allegedly imposing a relative burden on those who have more recently exercised their right to establish residence in the State.

Id. at 920 (O'Connor, J., dissenting).

A. The need to return to first principles.

To answer the question accepted for review in this case, it is necessary to return to first principles – that is,

to a position consistent with the text and history of the Constitution. As discussed more fully in section II of this brief, *Shapiro*'s lack of textual analysis and sweeping equal protection theory is an unjustified invitation to federal courts to displace rational legislative choices made by state and local governments that do not truly implicate express or historically implied fundamental rights. The confusion spawned by *Shapiro* is well-illustrated by *Soto-Lopez*, itself, where, as one commentator put it, "the right to migrate doctrine [was left] in disarray." Todd Zubler, *The Right to Migrate and Welfare Reform: Time for Shapiro v. Thompson to Take A Hike*, 31 Val. U. L. Rev. 893, 906 (1997). Indeed, the inherent flaw of the *Shapiro* rationale was identified in that case by Justice Harlan, whose dissenting opinion observed that because "[v]irtually every state statute affects important rights," the equal protection theory employed by the majority "creates an exception which threatens to swallow the standard equal protection rule." *Shapiro*, 394 U.S. at 661 (Harlan, J., dissenting). *Shapiro*'s rationale must be re-examined and re-anchored on textual constitutional ground, or it will continue to mislead lower courts and unnecessarily constrain state authority.

Again, as Justice O'Connor so well illustrated in *Zobel*, the Article IV Privileges and Immunities Clause has "enjoyed a long association with the rights to travel and migrate interstate." *Zobel*, 457 U.S. at 79 (O'Connor, J., concurring). The Clause derives from Article IV of the Articles of Confederation, which expressly recognized a right of "free ingress and regress to and from any other State" as well as the "privileges and immunities of free citizens in the several States." The drafter of the subsequent constitutional Article IV, Charles Pinckney, observed to the convention that the Article was "formed

exactly upon the principles of the 4th article of the present Confederation." 3 M. Farrand, *Records of the Federal Convention of 1787* 112 (1934). And the identity of purpose of the two provisions, notwithstanding the folding of the ingress and regress right into the more general privileges and immunities language, has never been doubted.[2]

B. The two aspects of privileges and immunities: nondiscrimination and substantive natural rights.

It is important to emphasize that the historical meaning of the Privileges and Immunities Clause was twofold: securing movement (ingress and regress) or migration (settlement in a new state) and also more profoundly, "to secure the free inhabitants of each of these states . . . all privileges and immunities of free Citizens in the several States"[3] (that is, the natural rights of citizenship "in the several States," which as an historical matter was synonymous with the later usage "in the United States").

Contrary to the implications of *Shapiro*, the right to migrate has no genesis in the Equal Protection Clause; rather, it is a descendant of Article IV Privileges and Immunities and now the Fourteenth Amendment as well. Insofar as *Shapiro* overlooked this Court's Article IV jurisprudence, it created two errors. First, it set the Court on

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[2] For example, Chief Justice White in *United States v. Wheeler*, 254 U.S. 281, 294 (1920) held that "the text of Article IV, Section 2, of the Constitution, makes manifest that it was drawn with reference to the corresponding clause of the Articles of Confederation and was intended to perpetuate its limitations; and . . . that view has been so conclusively settled as to leave no room for controversy."

[3] Articles of Confederation art IV.

an interpretative voyage unable to sustain in a principled way any distinction between new and old residents drawn by the States, whether or not these distinctions were intended to affect migration or had that effect. Second, and of a more insidious nature, *Shapiro* cast doubt on this Court's ability to protect those vital, but unenumerated, fundamental rights that can be traced "to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *Michael H. v. Gerald D.*, 491 U.S. 110, 127-28 n.6 (1989).

The claim that California's two-tier welfare benefit structure offends an historically relevant tradition protecting the unenumerated right to migrate is untenable. To be sure, distinctions among classes of residents in terms of common law-grounded privileges and immunities, such as the right to acquire and possess property or the right of every citizen "to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or . . . to institute and maintain actions of any kind in the courts of the state. . . . " *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), certainly invite heightened scrutiny like that employed by this Court in *Supreme Court of New Hampshire v. Piper*. Thus, for example, any attempt by California to prevent Nevada plumbers from migrating into the Golden State to practice their occupation would trigger heightened scrutiny. But the statute at issue here implicates no such concerns that can be grounded in history or tradition.

The Court is invited in this case to locate the right to migrate in constitutional text rather than leave it, as Justice O'Connor aptly put in her *Soto-Lopez* dissent, "free-floating." We urge the Court to follow the original textual meaning of the Privileges and Immunities Clauses

in their entirety. See *Soto-Lopez*, 476 U.S. at 918. The unspoken assumption of both Article IV and Fourteenth Amendment Privileges and Immunities is that they have substantive content *in addition* to their promise that a receiving state shall not exclude altogether or invidiously discriminate against incoming residents with regard to state-granted rights and privileges. Legal historian Chester James Antieau writes, for example, "At the time the Articles of Confederation were adopted the overwhelming majority of Americans accepted the doctrine of natural rights. All men possessed certain basic, fundamental rights which the government could not deny." Chester James Antieau, *Paul's Perverted Privileges or the True Meaning of The Privileges and Immunities Clause of Article Four*, 9 Wm. & Mary L. Rev. 1, 4 (1967). In unexamined ways, however, perhaps because of the unprincipled example of *Shapiro* and its unacknowledged forebear, *Lochner v. New York*, 198 U.S. 45 (1905), the Court's recent Article IV case law has been casually dismissive of natural rights in the historical record. See *Piper*, 470 U.S. at 281 n.10 (1985) (in dicta and without explanation describing our natural rights as "discarded").

C. The natural rights content of the Privileges and Immunities Clause is both textual and derived from relevant common law tradition.

Natural rights are identifiable and enforceable. For example, in the due process context in *Michael H.*, and the Court's prescribed antecedent inquiry into background principles of state property law in recent application of the Taking Clause's protections, see *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court has located natural rights in the identification of "relevant

traditions" of the state common law. Such close examination of history and practice is an apt model for the description of natural rights shielded as a privilege or immunity. The Court's approach for identifying such privileges and immunities is consistent with venerable originalist sources. In 1797, Judge Chase opined that one of the privileges and immunities of citizens of the several States was the right "to acquire and hold real property in any of the states." *Campbell v. Morris*, 3 H. and McH. 535, 553 (Md. 1797). Again, in 1821, Article IV was construed in the Delaware Chancery Court where Justice Ridgely stated: "The words 'privileges and immunities' comprehend all the rights, and all the methods of protecting those rights, which belong to a person in a state of civil society, subject to be sure, to some restrictions, but to such only as the welfare of society and the general good require." *Douglas v. Stephens*, 1 Del. Ch. 465, 469 (1821). In the same case, Chief Justice Johns observed that "[t]he privileges and immunities secured to all citizens of the United States are such only as belong to the citizens of the several States; which includes the whole United States, and must be understood to mean, such privileges as should be common in the Union." *Id.* at 477. This coincides well with Joseph Story, who wrote in his famous Commentaries, "The intention of this clause was to confer on them, if one may so say, a general citizenship; and to communicate all the privileges and immunities, which the citizens of the same state would be entitled to under the like circumstances." 3 Joseph Story, *Commentaries on the Constitution of the United States*, section 1800 at 674-75 (photo. reprint 1991) (Boston, Hilliard, Gray & Co. 1833). Hamilton made plain that he, too, understood the words "privileges and immunities of the citizens of the several States" as the equivalent of not just

those privileges simply granted by a second state to a citizen migrating from another, but the privileges and immunities of United States citizens. The Federalist No. 80 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

While Chief Justice Roger Taney grievously would later find African-Americans to be incapable of citizenship and misconstrued the Due Process Clause in the catastrophic decision of *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), even he recognized:

> if persons of the African race are citizens of a State, and of the United States, they would be entitled to all of these privileges and immunities in every State, and the State could not restrict them; for they would hold these privileges and immunities under the paramount authority of the Federal Government, and its courts would be bound to maintain and enforce them, the Constitution and laws of the State to the contrary notwithstanding.

Id. at 423. Justice Curtis' view in *Scott* was much the same: "Nowhere else in the Constitution is there anything concerning a general citizenship; but here, privileges and immunities to be enjoyed throughout the United States, under and by force of the national compact, are granted and secured." *Id.* at 580.

Later, the "[u]tterances of our national leaders in both the United States Senate and the House of Representatives during the mid-nineteenth century provide irrefutable evidence that legislators were in complete agreement with the judiciary that the privileges and immunities to be protected by Article Four were the basic, fundamental, natural rights of men." Antieau, *supra*, at 15. In the 35th Congress, for example, Congressman Bingham, who would later play a pivotal role in the drafting of the Fourteenth Amendment, stated that the

privileges and immunities secured by Article IV were "those rights, common to all men [which] no man or state may rightfully take away." *Cong. Globe*, 35th Cong., 2nd Sess. 984 (1858).

D. As a matter of original understanding, citizens may assert privileges and immunities against their own State.

It is sometimes claimed that Article IV provides no protection to a citizen from his own State. See, e.g., *Maldonado v. Houstoun*, No. 97-1893, 1998 U.S. App. LEXIS 21909 (3d Cir. Sept. 9, 1998) n.9 (dismissing an Article IV and Fourteenth Amendment claim on this basis). Historically, of course, this doubt was part of the impetus for the Fourteenth Amendment. Yet, even before that Amendment, legal historians record that it was the "assumption throughout [the] years previous to 1868, entertained by jurists, legislators and scholars [ ] that proper constitutional law would not permit a state to strip its own citizens of their natural rights, and that the Privileges and Immunities Clause of Article Four would equally protect citizens from other states if they were ever exposed to the denial of such rights." Antieau, *supra* at 21. A similar point was raised and answered by Justice O'Connor in *Zobel* when she urged that the Court put the *Shapiro* travel right on a textual footing. She wrote: "It could be argued that Alaska's scheme does not trigger the Privileges and Immunities Clause because it discriminates among classes of residents, rather than between residents and nonresidents." 457 U.S. at 75. But the timing of the discrimination, continued Justice O'Connor, "does not

insulate Alaska's scheme from scrutiny under the Privileges and Immunities Clause." *Id.*[4]

Some of the confusion over whether Article IV is both a substantive guarantee capable of assertion against one's own State as well as a nondiscrimination principle is traceable to the Court's decision in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869), where Justice Field emphasized the nondiscrimination side of Article IV. Field wrote: "the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens." *Id.* at 180. It is error, however, to see this statement as foreclosing the fundamental rights protection of the Privileges and Immunities Clause. In context, it does not. Indeed, in light of the interpretative method applied by the modern Court in *Michael H.* already alluded to, it can fairly be read to mean merely that the content of protected privileges and immunities are likely best identified out of the common law of the States – that is, to use Field's somewhat infelicitous phrasing, rights "common to the citizens in the latter States." *Id.* Reading Field's statement as merely a principle of nondiscrimination disregards the dual purposes of the Clause as set out above, and also leads to the absurd consequence that "if a person from

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[4] Justice O'Connor did note that the Clause might not be offended by an age-based discrimination applied evenhandedly to old and new residents. *Zobel*, 457 U.S. at 75-76 n.6. This, of course, is true, but only because there is no textual or historically grounded common law right implicated by such age differentiation. It is not merely because old resident and new resident under the Justice's hypothetical would be treated alike.

New York, for example, went to Mississippi and was totally denied freedom of speech, assembly, movement, petition, press, access to the courts, and even the writ of habeas corpus, it would all be constitutional so long as the citizens of Mississippi had regularly been denied the same rights!" Antieau, *supra* at 22. Of course, no state could infringe the express Bill of Rights, but only because the judiciary has reasoned that these textual rights were intended to be incorporated against the States through the Fourteenth Amendment. It would be formalistic in the extreme for the Court not to maintain the same treatment for unenumerated privileges and immunities due all citizens of the United States like the right to acquire and possess property, pursue a lawful occupation, and migrate.

These fundamental natural rights are not the products of judicial whim. As the Court has held, the character and scope of such rights are to be determined largely in relation to the whole tradition and history of the common law in the States, themselves. Indeed, two years after *Paul v. Virginia*, the Court decided *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1871), in which the Court defined the privileges and immunities of Article IV as those anchored in "the common law." Elaborating, the Court stated in *Ward* that the Clause "plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business, without molestation; to acquire personal property; [and] to take and hold real estate. . . . " *Id.* at 430.

E. *Slaughter-House* did not slaughter the natural rights protected by the Privileges and Immunities Clause.

The standard teaching at this point may be to say that this history of natural rights protection is all well and good, but the Court's 5-4 decision in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1871) nullifies privileges and immunities altogether. This is an over-reading of *Slaughter-House*, but a common and deceiving one. It is deceiving because, at worst, Justice Miller's majority opinion limiting the Privileges or Immunities Clause that had been inserted into the Fourteenth Amendment leaves Article IV unaffected. That this is true is apparent from Justice Field's dissent in *Slaughter-House* in which he references and approves the list of privileges in *Corfield v. Coryell*. Justice Field, the author of the ambiguous *Paul* opinion just a few years earlier, writes unambiguously on this occasion: "The privileges and immunities designated are those *which of right belong to the citizens of all free governments*." *Id.* at 97 (Field, J., dissenting) (emphasis in the original). There is nothing ambiguous about that.

Volumes could, and have been written, criticizing the crabbed and ahistorical opinion written by the narrow majority in *Slaughter-House*.[5] As one author noted, "The history of abuses that led to the Amendment received

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[5] See, e.g., David A. J. Richards, *Conscience and the Constitution: History, Theory, and Law of the Reconstruction Amendments* 204-17 (1993); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 100 Yale L.J. 1193, 1257-59 (1992); William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 156-64 (1988); Walter F. Murphy, *Slaughter-House, Civil Rights, and the Limits on Constitutional Change*, 32 Amer. J. of Juris. 1, 1-8 (1987).

superficial and cursory attention at best," while the Amendment's legislative history "received no attention at all." Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 173, 175 (1986). It is not necessary to recount here how the Court in *Slaughter-House* disregarded the debates over the Freedmen's Bureau Bill, the companion 1866 Civil Rights Act, and the Fourteenth Amendment. It is enough to observe how all this legislation was to make true in fact what was already written in Article IV that "citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." *Cong. Globe*, 39th Cong., 1st Sess., App. 67 (1865) (Representative Garfield). It was the intent of the Fourteenth Amendment Privileges or Immunities Clause not to create new rights, but to protect preexisting rights from state interference and to give express legislative power to the Congress to enforce the privileges of all free citizens that must exist in every State pursuant to Article IV. *Cong. Globe*, 39th Cong., 1st Sess. 1034 (1865) (Representative Bingham). The Amendment, said Bingham, "is a direct, affirmative delegation of power to Congress to carry out the principles of all these guarantees, a power not found in the Constitution." *Id.* at 2766. Not everyone agreed with Bingham, of course, that Congress lacked original power to enforce Article IV, but the Fourteenth Amendment would eliminate all doubt and would make it express. The Amendment did, but Justice Miller in *Slaughter-House* substituted his view for that democratically chosen.

Whether or not it is too late in the day to reconsider *Slaughter-House* is a matter of some debate.[6] Perhaps, as

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[6] See, e.g., Philip B. Kurland, *The Privileges or Immunities Clause "Its Hour Come Round at Last"?*, 1972 Wash. U. L.Q. 405;

Justice Thomas has suggested in scholarly writing, see Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 Harv. J.L. & Pub. Pol'y 63, 68 (1989) (the rights protected by the Privileges or Immunities Clause are fundamental to the American regime and the best protection against the "willfulness of both run-amok majorities and run-amok judges." *Id.* at 63-64), this debate is now an unnecessary one. The debate is only unnecessary, however, if one correctly perceives – as we believe Justice Thomas does – that the rights of national citizenship in Article IV, including the right to migrate, are unaffected by the *Slaughter-House* decision and are binding upon one's own State. See generally Douglas W. Kmiec & Stephen B. Presser, *The American Constitutional Order* 1079-1116 (1998). In this regard, we also owe much to Justice O'Connor for confirming in *Zobel* the continued life of these unenumerated, but common law-grounded privileges by making explicit reference to the post-*Slaughter-House* case law that reveals the substantive and nondiscriminatory character of Article IV. Justice O'Connor noted, for example, that "in *United States v. Wheeler*, 254 U.S. 281, 297-98 (1920), the Court found that the Clause fused two distinct concepts: (1) 'the right of citizens of the States to reside peacefully in, and to have free ingress into and egress from' their own States, and (2) the right to exercise the same [substantive] privileges in other States." *Zobel*, 457 U.S. at 80.

Wheeler involved the validity of a federal indictment brought against private individuals for seizing and holding persons residing in Arizona and transporting them by

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Clint Bolick, *Unfinished Business: A Civil Rights Strategy for America's Third Century* 76 (1990).

rail to New Mexico. The indictment was quashed for lack of federal power to address private, rather than state, action. In reaching this result, the Chief Justice pursued a "wide field of inquiry common to all the contentions" and answered each with the principles associated with the constitutional doctrine of the Privileges and Immunities Clauses in both Article IV and the Fourteenth Amendment. *Wheeler,* 254 U.S. at 293. Such principles, said the *Wheeler* Court, are "so well founded and so conclusively sustained by authority as to be indisputable." *Id.*

And what are these undisputed principles? *Wheeler,* notwithstanding the interruption of *Slaughter-House,* relies upon the pre-*Slaughter-House* opinion of *Ward v. Maryland,* 79 U.S. (12 Wall.) 418 (1871), where it is established that the words privileges and immunities

> [b]eyond doubt . . . are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens.

Id. at 430. Plainly, *Wheeler* does indeed acknowledge what Justice O'Connor's reasoning in *Zobel* implies; namely, that the Privileges and Immunities Clause contains two elements – one substantive and one non-discriminatory. The *Wheeler* opinion even has a more congenial understanding of *Slaughter-House.* Unlike the modern casebook characterization of *Slaughter-House,* which reads the

majority opinion in light of the fiery dissents as having created a previously unknown and insupportable state/federal distinction between the two guarantees of privileges and immunities, with the federal privileges being almost meaningless, *Wheeler* explains that *Slaughter-House* was largely making the point that the source of privileges and immunities was not the federal government, but the fundamental rights of all free citizens embodied in specific applications of the common law of the States. This is a point later reaffirmed by Justices Goldberg and Douglas in *Bell v. Maryland,* 378 U.S. 226, 255 (1964) (purpose of the Fourteenth Amendment was to protect "the rights and guarantees of the good old common law"). Most importantly, in deciding that Article IV reaches deprivations of privileges and immunities by states, rather than by private individuals, the *Wheeler* Court makes clear that were a State to enact provisions "incompatible with its existence as a free government and destructive of the fundamental rights of *its* citizens, . . . the existence of federal power to determine the repugnancy of such action to the Constitution . . . are not disputed." *Wheeler,* 254 U.S. at 299 (emphasis added).

In the remaining portions of this brief, we make it plain that California has not transgressed any privilege or immunity by declining to immediately increase the welfare benefits of newcomers to her State beyond the level they received from their prior States. We are confident that the Court will reach the same conclusion. However, it bears emphasis that this result follows not because there are no privileges and immunities, but importantly and more modestly, because a claim for an increased level of public assistance from one's newly adopted State cannot be said to be a fundamental right derived from the

text of the Constitution or long-settled common law traditions. *Shapiro*'s rationale to the contrary is mistaken and presently leads to a confusing body of precedent described aptly as a "doctrinal mess." See, e.g., Zubler, *supra* at 893. The escape from this mess can be found in faithfulness to constitutional text and history, not wholesale abandonment of the privileges and immunities that made that history a possibility.

II. THE IMPROVISED EQUAL PROTECTION RIGHT TO TRAVEL RATIONALE IN *SHAPIRO V. THOMPSON* IS NOT A FAITHFUL REPRESENTATION OF THE RIGHT TO MIGRATE UNDER THE TEXTUAL PRIVILEGES AND IMMUNITIES CLAUSES, IS OVER-BROAD, AND HAS PROVEN TO BE INCAPABLE OF PRINCIPLED LIMITATION.

When *Shapiro* was decided, the Court failed to properly measure the claimed right to travel under the existing Privileges and Immunities Clauses, or for that matter, any other part of the Constitution. ("We have no occasion," wrote Justice Brennan, "to ascribe the source of this right to travel interstate to a particular constitutional provision." *Shapiro*, 394 U.S. at 630.) Instead, the Court fashioned a new equal protection right, nominally premised upon travel, but actually covertly requiring some level of mandated welfare assistance. In *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 261 (1973), the Court, itself, described the *Shapiro*-created right to travel as ensuring new residents "the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents."

A. A welfare subsidy disguised as a travel right.

While the *Shapiro*-created right may at first blush sound similar to the dual nondiscrimination and substantive natural right purposes of the Privileges and Immunities Clauses, closer examination reveals it to be a subtle counterfeit. Neither in history, text, nor common law tradition can one find a right to "vital government benefits." There is no constitutionally-imposed welfare subsidy guarantee. Without a grounding in constitutional text or historical tradition delimiting such right, it is impossible to predict where it will turn up or to what it will relate.

The Constitution and the traditions of this Nation preserve many rights that are fundamental in nature and that cannot be abridged. While the right to migrate to another state to pursue one's chosen profession is one of these rights, a constitutionally-mandated entitlement to higher welfare benefits in one's new State of residence is not among them. The importance of a well-conceived welfare policy, as a matter of both private charity and modern federal and state legislative judgment, cannot be questioned. Yet, whether new residents of a State are entitled to an increase in benefits over the level of their prior State as is claimed in this case is a question to be resolved in legislative chambers, not in courts.

On three separate occasions, the Court has stated that citizens cannot demand, on the basis of constitutional text or history, financial subsidies. In *Dandridge v. Williams*, 397 U.S. 471 (1970), *Lindsey v. Normet*, 405 U.S. 56 (1972), and *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), the Court held that housing, welfare, and education were not fundamental rights. Most directly, in *Dandridge*, the Court stated that even though the administration of welfare benefits involve "the most basic economic needs"

there is no basis for applying heightened scrutiny under the Constitution to benefit level decision-making. *Dandridge*, 397 U.S. at 485.

This lack of a constitutional origin for welfare claims does not render the federal government heartless or uncaring of the less fortunate. Rather, it makes the provision of assistance a matter entrusted to the people through their elected representatives and therefore does not affect the freedoms guaranteed by the Bill of Rights or the Fourteenth Amendment. See *Dandridge*, 397 U.S. at 487 ("The Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.").

B. *Shapiro*'s created right to travel is over-broad and unworkable.

In dissent in *Shapiro*, Justice Harlan quickly saw the flaw in the Court's newly created welfare-right to travel: "Virtually every state statute affects important rights. . . . and to extend the 'compelling interest' rule to all cases in which such rights are affected would go far toward making this Court a 'super legislature.' " *Shapiro*, 394 U.S. at 661 (Harlan, J., dissenting). The difficulty was compounded because *Shapiro* did not define what type of restriction would constitute a "penalty" on its new-found right. In *Shapiro*, the Court, without apparent recognition of contradiction, both asserted that a temporary deprivation of one of the "necessities of life" constituted a penalty and that some undefined durational residency requirements "may not be penalties upon the exercise of the constitutional right of interstate travel." *Id.* at 627, 638 n.21.

In an attempt to tame its creation, the Court in *Maricopa* sought to distinguish necessities from non-necessities. In that case, the Court asserted a distinction between education (a non-necessity) from non-emergency medical care (a necessity). See 415 U.S. at 260 n.15. While the distinction as a matter of enlightened personal philosophy may be unexceptional, it is nonetheless a non-constitutional one. These narrowing efforts again illustrate that in application the new right has had less to do with travel or migration than with the judiciary's imposition of *its* conception of what levels of basic necessity must be provided by the legislative departments of government, whether the people of the State consent or not.

Moreover, *Shapiro* can be fairly read to mandate, under heightened scrutiny, a compelling state interest for any refusal not to deliver welfare benefits at a level at least as high as the most generous State. See Thomas R. McCoy, *Recent Equal Protection Decisions – Fundamental Right to Travel or "Newcomers" as a Suspect Class*, 28 Vand. L. Rev. 987, 999 (1975). As Professor McCoy observes, the *Shapiro* rule

> would seem to apply any time a state or political subdivision of state offers lower quality schools than those available in some other state, has less garbage collection than that available in some other state, provides more limited water and sewer service than that available in some other state, contains lower quality roads than those provided in some other state, or charges higher state university tuition than that charged for a comparable education in some other state. Travelers from those other states will suffer a loss in benefits of residence in the new state as compared with those available in the old and thus

> experience precisely the same sort of disincentive to travel as that experienced by the plaintiffs in *Shapiro*.

Id. at 999-1000. If Professor McCoy is correct, Justice Harlan in his *Shapiro* dissent understated his concern about the Court becoming a "super-legislature"; the Court would have become the ultimate legislature.

C. *Shapiro* is not capable of principled limitation.

Justice Marshall's attempt in *Maricopa* to limit the effective sweep of *Shapiro* to a judicial conception of "basic necessities" illustrates that principled limitation of this constitutionally-ungrounded doctrine is unavailing. Every state, as a matter of legislative policy, is motivated to address the basic necessities of its citizens. Nevertheless, States do so in different ways, through different programs, and at different benefit levels to meet the specific economic conditions of each state. State A, for example, might set a qualifying income for general welfare assistance as any citizen making less than $15,000 annually in light of housing, food, and other subsidies available; but State B, reflecting a state policy to provide consolidated welfare assistance without additional programs, may allow general welfare assistance to any citizen with an income less than $10,000 a year. Were a citizen making $11,000 per year in state A to move to state B, his income would exceed the eligibility threshold and thus disqualify him for general welfare. Has he then suffered a penalty with regard to travel-related basic necessities even as no other citizen in state B would qualify at his income level? Since the logical answer is no, Justice Marshall's attempt in *Maricopa* to salvage *Shapiro* is unsuccessful. It merely shifts the judicial *ipse dixit* from whether a one-year wait as in *Shapiro* is severe, to a

judicial weighing of different qualifying incomes or a judicial assessment of what is and is not a basic necessity or to similar judicially unmanageable comparisons.

The Court's other cases attempting to apply the new-found travel right in *Shapiro* are no less troubled, and are largely explainable, if at all, by non-migration related reasons.[7] The Court has also tried to avoid the *Shapiro* difficulty by simply not using it. Thus, in *Zobel v. Williams*, the Court invalidated Alaska's plan for distributing oil windfall revenues based on the length of residency within the State by purportedly applying rational basis review. Certainly, this suggests some recognition on the Court's part that there was a problem with the newly formed travel right created in *Shapiro*, which would have mandated strict scrutiny. Unfortunately, the Court nonetheless went ahead and employed heightened rational basis review anyway to do-in the statute. This left constitutional commentators in total confusion, though they wrote the decision off as idiosyncratic.[8] Of course, it was

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[7] In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Court held that invalidating a residency requirement for voting depends more upon the fundamental nature of the representative-reinforcing functions of the franchise than intended or actual deterrence on the newly minted right to travel. Indeed, the opinion in *Dunn* confusingly divorces the protection of a supposed travel right from any consideration of a legislative intent to deter migration or whether State law actually has that effect. The elimination of all assessment of a given legislative choice's deterrent effect on migration, however, reveals that what was at issue in *Dunn* was not migration, but the fundamental right to vote.

[8] See, e.g., Laurence H. Tribe, *American Constitutional Law* Section 16-2 (2d ed. 1988) (opining that the decision is "more the result of dissatisfaction with the existing tools of equal protection analysis for dealing with [discrimination against

in *Zobel*, where Justice O'Connor suggested re-connecting the right to travel or migrate to the Constitution. Justice O'Connor concurred in the *Zobel* judgment, but did not have an opportunity to explore at length the history of the Privileges and Immunities Clauses, and specifically to inquire whether Alaska's allocation of a unique windfall could meaningfully be said to fit within the textual or long established common law right to migrate. Rather, assuming the authentic right to migrate to be implicated, Justice O'Connor proceeded to apply heightened review and inquired whether Alaska had substantially demonstrated non-residents to be a peculiar source of evil to be addressed. See *Zobel*, 457 U.S. at 77-78.

It is highly questionable whether the Alaska program in *Zobel* infringed any historically-grounded right to migrate under the Privileges and Immunities Clauses. Arguably, Justice O'Connor's important effort was focused on the greater problem: the re-attachment of the right to migrate to constitutional text. The particular application was thus unimportant, or perhaps, explainable on transitional or corrective *stare decisis* grounds. That Justice O'Connor shared some of this ambivalence, perhaps, is revealed by her dissenting opinion in *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986). *Soto-Lopez* invalidated a civil service employment preference for veterans who had lived in New York at the time they entered the service. The Court struck a similar New Mexico preference the year before, again awkwardly using a type of heightened rational basis review otherwise unknown to the Court's work. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985). *Soto-Lopez* left the *Shapiro*

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newcomers] than of any overall shift in the Court's scrutiny of how well various purposes fit legislatively chosen means.").

right to travel in shambles, with a plurality feebly trying to revive it. Chief Justice Burger and Justice White concurred on rational basis grounds, with Justices O'Connor, Rehnquist, and Stevens pointing out the obvious: New York's statute had an easily identifiable rational basis – an expression of gratitude to state citizens who were doing the State's part to pick up the hardship of national military service – and the right to migrate contained in the Privileges and Immunities Clause of Article IV was not implicated. See *Soto-Lopez*, 476 U.S. at 920-25.

D. California's two-tier welfare structure has a rational basis.

California has an ample rational basis for its two-tier benefit structure, and as suggested throughout, the textually-based and tradition-informed Privileges and Immunities Clause right to migrate is not infringed. Moreover, the rationality of this policy is reinforced by the fact that Congress expressly authorized California's two-tier welfare structure in the Personal Responsibility and Work Opportunity Act of 1996 (PWORA). See 42 U.S.C. § 604(c) (Supp. 1997).

Empirical evidence suggests that States ought not be denied the ability to experiment with different welfare levels. Imposing uniformity borne of *Shapiro*'s specious travel right may cause a "race to the bottom" where each State defensively preserves existing welfare resources by lowering benefits. Since 1970 and the Court's decision in *Shapiro* the year before, general welfare benefits have declined steadily to a post-war nadir of $349 in 1993. See Paul E. Peterson, *The Price of Federalism* 110 (1995). This is not to assert a direct, but-for causal relationship between *Shapiro* and the observable decline, but it is to suggest that no reasonable state welfare administrator can afford

to avoid making this rational inquiry. At a minimum, an administrator desirous of conducting a well-managed program with limited fiscal resources will need to keep a reasonable eye on the number of people capable of being effectively assisted. This is particularly true since statistics show that after five years a high benefit level state will have a poverty rate approximately one percentage point higher than a similar state with low welfare benefits. See Paul Peterson, *Devolution's Price*, 14 Yale J. on Reg. 111 (1996). In a state as populous as California, this translates into thousands of additional welfare recipients. Additionally, studies have shown that for every $100 difference in the welfare benefit levels of neighboring states, the high benefit level state would be effectively forced to reduce its benefit level for residents by $30 to hold expenditures constant. See *id.* at 117. Overall, the statistics reveal that high welfare levels like California's, which at present are the fifth highest in the Nation, are "magnetic" in that they both dissuade the poor from leaving a state and attract additional poor into a state.[9]

Opponents of two-tier residency requirements attempt to assail the rationale of a two-tier benefit structure as "exclusionary." But this pejorative label adds nothing but atmosphere, and it certainly obscures the prudence implicit in a State seeking to apportion benefits in a manner cognizant of limited budgets and an existing

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[9] See Paul Peterson, *Welfare Magnets* 20 (1990); Rebecca Blank, *The Effect of Welfare and Wage Levels on the Location Decisions of Female Headed Households*, 24 J. of Urban Econ. 186 (1986); see also Edward Gramlich & Deborah S. Laren, *Migration and Income Redistribution Responsibilities*, 19 J. of Hum. Res. 489 (1984).

population already reliant upon its assistance. It is no more irrational for a State to mitigate the growth of its welfare budget than it is to mitigate provable environmental harms by reasonable land use decisions, coordinating growth (due in part to interstate migration) with existing physical resources. Both are local decisions, and absent infringement of a textual property right or one identified by an antecedent inquiry into a State's common law of property, entitled to the deference of this Court. Without the ability to structure benefit levels in tiers to moderate demand burdens on the existing system, States are likely to reduce benefits across the board.[10] Indeed, the empirical work dealing with welfare benefit levels suggests that without a two-tier residency structure, States would be tempted to pursue greater *denials* of benefits to all residents which "might deter migrants who are moving to another job in the new state." F.H. Buckley and Margaret F. Brinig, *Welfare Magnets: The Race for the Top*, 5 Sup. Ct. Econ. Rev. 141, 176-77 (1997). In this sense, California's two-tier structure is not only rational, but it is also the very means by which a burden on the genuine right to migrate is preserved – that is a right exercised in pursuit of "the liberty . . . to work in an honest calling and contribute by your own toil in some sort to the support of yourself, to the support of your fellowmen,

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[10] As a recent study observed: "[i]t is disingenuous to claim that devolution [of welfare responsibilities in the federal system] will result in a competition to cut benefits, and then to deny states the power to cure the problem through reasonable residency standards." F.H. Buckley and Margaret F. Brinig, *Welfare Magnets: The Race for the Top*, 5 Sup. Ct. Econ. Rev. 141, 176 (1997) (expressly approving of the California two-tier plan and even suggesting that Congress give some thought to mandating it).

and to be secure in the enjoyment of the fruits of your toil." *Cong. Globe*, 42d Cong., 1st Sess., App. 86 (1871) (Representative Bingham).

The Equal Protection Clause is designed to reach invidious classifications. It is not intended as a universal substitute for the enforcement of other fundamental constitutional guarantees. Whether or not a given classification offends a fundamental right depends entirely upon the definition of that right as outlined in the traditions and customs of the Nation. In this instance, history reveals the right to migrate to engage in commerce, trade, or business predates the Constitution; but the right asserted here by respondents – to receive a higher level of welfare benefits from one's new State of residence – is by no means a right rooted in our Nation's history or tradition.

E. The Court should abandon *Shapiro's* constitutionally problematic framework.

For the reasons advanced by petitioners, the Court could uphold the California statute in this case while plausibly avoiding the practical difficulties and the infringement on democratic State authority occasioned by *Shapiro*. This has been the lot of the lower courts, and it has avoided some, but not all, of the absurdities invited by *Shapiro*.[11]

The Court, however, should not follow this path. In doing so, it would be treating only the symptom of the

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[11] Compare *Jones v. Milwaukee County*, 485 N.W.2d 21 (Wis. 1992) (upholding a sixty day denial of all welfare assistance as not a penalty because it is so much less than one year) with *Mitchell v. Steffen*, 504 N.W.2d 198 (Minn. 1993) (invalidating a lower welfare level for the first six months as a penalty).

constitutional virus implanted by *Shapiro*. As one lower federal court observed:

> Many scholars have criticized the Supreme Court's right to travel jurisprudence . . . advancing many cogent reasons as to why *Shapiro v. Thompson* [citation omitted], the leading case in this area, should be overruled or at least substantially modified. [citing authorities]. . . . Many scholars criticize the *Shapiro* Court for issuing a decision that was an exercise in judicial policymaking rather than textual interpretation of the Constitution. Further, many scholars claim that the right to travel jurisprudence is unsettled and fractured because the *Shapiro* Court failed to base the right to travel on a specific textual provision of the Constitution. This Court would tend to agree with this proposition. The Supreme Court's failure to ground the right to travel in a particular provision of the Constitution has led to an unreasoned application of this doctrine because the lower federal courts must apply this right to travel jurisprudence without fully considering the purposes behind the right to travel within its proper textual context.

Maldonado v. Houstoun, 177 F.R.D. 311, 323 n.11 (E.D. Pa. 1997). Seldom is such an explicit judicial S.O.S. given. We respectfully suggest that while rescue in this case might be accomplished by the puny raft of legalistic distinction, both the need of lower courts for more explicit guidance and respect for text, history, and State authority demand a refreshed constitutional vessel.

CONCLUSION

For the foregoing reasons, *amicus* Institute for Justice respectfully requests that the decision of the Ninth Circuit be reversed, and in doing so, that this Court clarify the constitutional foundation of the right to migrate to make it clear that this right is grounded in the Privileges and Immunities Clauses of the Constitution.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1998

ELOISE ANDERSON, ET AL.,
Petitioners

v.

BRENDA ROE AND ANNA DOE,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA, AND THE STATES OF ALABAMA, FLORIDA, GEORGIA, HAWAII, MARYLAND, MINNESOTA, MONTANA, NEVADA, NEW HAMPSHIRE, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, RHODE ISLAND AND WASHINGTON IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI

The "right-to-travel" doctrine announced by the Court in *Shapiro v. Thompson*, 394 U.S. 618 (1969), has subjected the *amici* States to unpredictable and ad hoc restrictions in discharging their responsibilities to their inhabitants, especially, but not only, in the area of welfare benefits.

The *amici* States, like California, are responsible for administering, within their respective jurisdictions, the cash and non-cash assistance programs authorized by the federally-funded Temporary Assistance to Needy Families program. *See* the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 (1996) ("Personal Responsibility Act"). Some of the *amici*, responding to Congress' invitation in the Personal Responsibility Act, have adopted welfare residency rules similar to California's; many of these rules have already been struck down by courts relying on *Shapiro*.

All of the *amici* have an interest in encouraging state experimentation and innovation to attack the seemingly intractable problems of poverty, and especially in encouraging approaches which encourage self-support rather than continued dependency on the part of welfare recipients. The *amici* therefore have a substantial interest in the fate of the specific provision of welfare law challenged in this case.

Shapiro's effects, however, have not been limited to the welfare area. *Shapiro* has also fueled attacks, sometimes successful, on other measures adopted by States and their subdivisions under their general police powers; these include measures to curb the problems of gang violence and juvenile crime such as anti-loitering ordinances, anti-cruising ordinances

and juvenile curfews. The *amici* have a substantial interest in being able to address such issues unhampered by *Shapiro's* unpredictable analysis.

SUMMARY OF ARGUMENT

The Court should reconsider and overrule *Shapiro v. Thompson*, 394 U.S. 618 (1969), in which the Court struck down welfare residency requirements as violative of the Equal Protection Clause. In *Shapiro*, the Court first asserted the existence of a "right to travel interstate" which is "fundamental" but unconnected to any particular constitutional provision; and held that any classification that "penalized" the exercise of this right would have to be justified by a compelling governmental interest. The Court then held that a durational residency requirement was such a "penalty," and dismissed as "impermissible" government's interest in discouraging migration solely for the purpose of obtaining higher welfare benefits.

1. *Shapiro's* approach to constitutional adjudication is an isolated anomaly, inconsistent with the cases that came before and after. Before *Shapiro*, the Court had repeatedly upheld claims related to travel, but almost invariably had grounded its holdings in specific constitutional provisions. Since *Shapiro*, the Court has repeatedly sought to avoid the judicial creation of indeterminate, open-ended "rights" by stressing the importance of constitutional text, historical practice and legal tradition in constitutional adjudication. In addition, the Court has repeatedly declined to extend *Shapiro's* "penalty" analysis, and its accompanying strict scrutiny, to similar situations, deferring instead to legislative judgments. *Shapiro* has thus proven doctrinally barren, living on as "a mere survivor of obsolete constitutional thinking."

2. Nevertheless, the ill effects of *Shapiro* continue. Congress authorized the States to adopt "two-tier" residency schemes like California's in order to encourage the States to adopt innovative approaches to welfare, unhampered by the fear that they might attract additional migrants who would imperil the viability of the very programs which had attracted them. Lower courts, however, have consistently relied on *Shapiro's* analysis to strike down "two-tier" residency schemes (even though those schemes differ significantly from those struck down in *Shapiro*). *Shapiro* is thus effectively discouraging the State experimentation and innovation which Congress believes is essential to the reform of the welfare system; and it may well be that, over the years, *Shapiro* has contributed to a "race to the bottom" as each State in turn cuts welfare benefits to avoid attracting welfare recipients. *Shapiro's* open-ended approach has also encouraged litigants in making "right-to-travel" attacks on such measures as juvenile curfews and anti-cruising ordinances.

3. *Stare decisis* should not stand in the way of *Shapiro's* demise. The Court has never hesitated to correct its own errors on constitutional matters because that is the only way, short of amending the Constitution, that they can be corrected. Nor is *Shapiro* the sort of decision around which significant reliance interests have clustered.

4. As the Court's pre-*Shapiro* decisions show, the text of the Constitution provides ample protection against State interference with travel. The Court should make clear that claims involving travel must be measured against specific constitutional provisions, and not against some generic "right to travel." The Court should also make clear that governments at both the State and federal levels have legitimate interests in discouraging welfare recipients from migrating in search of higher benefits.

ARGUMENT

The Court of Appeals, in holding that California's durational residency statute is likely unconstitutional, relied primarily on *Shapiro v. Thompson*, 394 U.S. 618 (1969) and its progeny.[1] The *amici* States agree with the petitioners that, properly understood, the *Shapiro* line of cases does not compel this result. Nevertheless, the fact remains that *Shapiro* is a deeply flawed decision, and we submit that the time has come for the Court to reconsider and overrule it.

I. *Shapiro v. Thompson* Has Proven to Be a Doctrinal Dead End, Unworkable in Practice Because it Is Unsound in Principle.

A. *Shapiro's* analysis, unbounded by text or tradition, is essentially unprincipled.

Before *Shapiro*, the Court had long held that the Constitution protects travel into, out of, and between the States. Thus, in the *Passenger Cases*, 7 How. 283 (1849), the Court struck down as unconstitutional state taxes on passengers entering the ports of Boston and New York from foreign ports. Chief Justice Taney dissented, but in a now-classic statement, expressed his view that no such taxes could be laid upon American citizens coming from the ports of other States:

[1]Neither the Court of Appeals nor the District Court discussed the merits at length. Rather, both courts invoked their earlier decisions in *Green v. Anderson*, 811 F.Supp. 516 (E.D. Cal. 1993), *aff'd without opinion*, 26 F.3d 95 (9th Cir. 1994), *vacated sub nom. Anderson v. Green*, 513 U.S. 557 (1995). *See* Pet. App. 8-9, 26-27; *Green*, 811 F.Supp. at 519-23 (discussing and applying *Shapiro* and its progeny).

> For all the great purposes for which the Federal government was formed, we are one people, with one common country. ...[A]s members of the same community, [we] must have the right to pass and repass through every part of it without interruption, as freely as in our own States.

Id., 7 How. at 492 (Taney, C.J., dissenting). Similarly, in *Crandall v. Nevada*, 6 Wall. 35 (1867), the Court invalidated a tax upon persons leaving the State; *Paul v. Virginia*, 8 Wall. 168 (1868), spoke, albeit in dicta, of each citizen's "right of free ingress into other States, and egress from them," *id.* at 180; and *Edwards v. California*, 314 U.S. 160 (1941), struck down a statute making it a misdemeanor to bring an indigent person into the State. *See also Kent v. Dulles*, 357 U.S. 116, 125 (1958) (right to travel abroad is an aspect of "liberty" protected by the Fifth Amendment's Due Process Clause).

In virtually all of these cases, the Court derived its holdings from specific textual provisions of the Constitution. Thus, in the *Passenger Cases*, the majority Justices based their holdings on the Commerce Clause, *e.g.*, 7 How. at 408 (McLean, J.), while Chief Justice Taney looked to the Privileges and Immunities Clause of Article IV and other provisions. *Id.*, at 492 (Taney, C.J., dissenting). *Crandall v. Nevada* did not explicitly cite any constitutional provision, but its analysis, which focuses on the relationship between citizens and their government, *see id.*, 6 Wall. at 43-49, seems to have been based on the Privileges and Immunities Clause,[2] and was so regarded in later decisions of the Court. *E.g., Slaughter-House Cases*, 16 Wall. 36, 79

[2]Two Justices concurred in *Crandall's* result on Commerce Clause grounds. *Id.*, 6 Wall. at 49 (Clifford, J. concurring).

(1872). *Paul v. Virginia,* likewise looked to the Privileges and Immunities Clause, *id.*, 8 Wall. at 180; while *Edwards v. California* relied on the Commerce Clause. *Id.*, 310 U.S. at 168. *See also Shapiro,* 394 U.S. at 630 n.8 (citing these and other cases).

Shapiro broke sharply with these precedents in its assertion of a generic "right to travel interstate," *id.*, at 630, unconnected to any particular constitutional provision. In *Shapiro*, the Court considered welfare laws from two States and the District of Columbia, each of which denied welfare benefits to applicants who had not resided within the jurisdiction for at least one year. *Id.*, at 620. The Court first held that

> in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and *any classification which serves to penalize that right*, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.

Id., at 634 (emphasis added). Holding that the provisions in question — which resulted in a complete denial of benefits — did penalize the right to travel, the Court rejected every proffered justification of them, as reflecting governmental interests that were either insufficiently compelling or simply illegitimate. *Id.*, at 627. Accordingly, the Court held that the provisions violated the Fourteenth Amendment's Equal Protection Clause. *Ibid.* The Court emphasized, however, that it was not invalidating waiting-period or residence requirements *per se*. To the contrary, in other contexts:

> [s]uch requirements may promote compelling state interests on the one hand, or, on the other,

> *may not be penalties* upon the exercise of the constitutional right of interstate travel.

Id., at 638, n.21 (emphasis added).[3]

In contrast to its approach in earlier cases involving travel, the Court in *Shapiro* specifically declined to ground its analysis upon a constitutional text:

> We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision. It suffices that ... [it] "occupies a position fundamental to the concept of our Federal Union."

Id., at 630, *quoting United States v. Guest*, 383 U.S. 745, 757 (1966). Nor, in shaping the contours of the right it had just asserted, did the Court look to historical practice[4] or legal tradition.[5] To the contrary: while the Court acknowledged that

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[3]The Court would later re-emphasize this point in *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 256-57 (1974).

[4]Durational residency requirements as a condition of receiving public assistance in English-speaking societies have been traced as far back as the Poor Law of 1535. 27 Hen. 8, ch. 25 (1535) (Eng.), *quoted in* W. Quigley, *Backwards Into the Future: How Welfare Changes in the Millenium Resemble English Poor Laws of the Middle Ages*, 9 Stan. L. & Pol'y Rev. 101, 103 n.36 (1998). For an unsympathetic recounting of these efforts, *see* S. Loffredo, *"If You Ain't Got the Do, Re, Mi": The Commerce Clause and State Residence Restrictions on Welfare*, 11 Yale L. & Pol'y Rev. 147, 154-57 (1993).

[5]When *Shapiro* was decided, 46 States had durational (continued...)

laws to discourage the influx of indigents into a given jurisdiction had been "prevalent" in American and English societies for "centuries," *Shapiro*, 394 U.S. at 628 n.7, the Court declared that this was a "constitutionally impermissible" purpose. *Id.*, at 631. According to the Court, a State may not "attempt to discourage those indigents who would enter the State solely in order to obtain larger benefits." *Ibid.* Such migrants, said the Court, "are surely ... no less deserving than [those] who move[] into a particular State in order to take advantage of its better educational facilities." *Id.*, at 632.

Shapiro was problematic in several respects. First, unlike earlier cases, *Shapiro* not only failed to ground its analysis in the text of the Constitution, but explicitly disavowed any need to do so; and it disregarded not only the constitutional text but the relevant history and tradition. Second, its dismissal of the States' asserted interest — discouraging those who would migrate in search of larger benefits — was supported only by what seemed raw policy choices about who was and was not "deserving." Finally, while it emphasized that not all durational residency requirements "penalized" travel, it gave no further guidance about what would or would not constitute a "penalty."

All of this gave *Shapiro's* analysis an indeterminate, open-ended quality, which in turn led to the criticism that *Shapiro's* approach simply cloaked value judgments of a kind more properly left to elected officials. Justice Harlan, writing in dissent in *Shapiro*, demonstrated that the result the Court had reached could not be supported by any of the constitutional provisions which might conceivably bear on the case, *id.* at 666-

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[5](...continued)
residency requirements. *Id.*, 394 U.S. at 676 & n.36 (Harlan, J., dissenting).

77, and remarked that he knew of "nothing which entitles this Court to pick out particular human activities, characterize them as 'fundamental,' and give them added protection...." *Id.*, at 662 (Harlan, J., dissenting). Chief Justice Warren agreed: "The era is long past when this Court under the rubric of due process has reviewed the wisdom of ... congressional decision[s]." *Id.*, at 654 (Warren, C.J., dissenting).

Later cases added little of substance to *Shapiro's* analysis, and amounted to little more than an ad hoc list of provisions which, in the Court's judgment, did or did not violate the "right to travel." *See, e.g., Memorial Hospital v. Maricopa County, supra* (one-year residence requirement as condition for receiving free non-emergency medical care violates right to travel); *Sosna v. Iowa*, 419 U.S. 393 (1975) (one-year residence requirement as condition for receiving divorce does not violate right to travel); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986) (plurality) (veterans' preference for those who entered armed services while State residents violates right to travel).

Shapiro thus continued to attract a drumbeat of criticism from within the Court. *E.g., Memorial Hospital v. Maricopa County*, 415 U.S. at 286 (Rehnquist, J., dissenting) ("the Court should observe its traditional respect for the State's allocation of its limited financial resources rather than unjustifiably imposing its own preferences"). In the most recent of the Court's right-to-travel decisions, the plurality opinion was still maintaining that "[t]he textual source of the constitutional right to travel ... has proved elusive.... [W]e have not felt impelled to locate this right definitively in any particular constitutional provision," *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (plurality opinion of Brennan, J.), while the dissenting Justices criticized that opinion's reliance on "some free-floating 'right to

migrate'...." *Id.*, at 918 (O'Connor, J., dissenting).

> It is unfortunate that the Court has once again failed to articulate and justify by reference to textual sources a single constitutional principle or analysis upon which it can rely in deciding cases such as this.
>
> * * * *
>
> [T]he plurality's right to travel analysis [threatens to] swallow all the traditional deference shown to state economic and social regulation

Id., at 920, 925 (O'Connor, J., dissenting).

Outside the Court as well, *Shapiro* has continued to be controversial: scholars have found it lacking in coherence[6]; while lower courts have complained that its analysis is difficult to apply and that its results are sometimes incongruous. *See* Br. of Commonwealth of Pennsylvania, et al., Amicus Curiae in Support of Petition for Certiorari at 11-12 (filed August 19, 1998) (collecting cases).

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[6]*See* T. Zubler, *The Right to Migrate and Welfare Reform: Time for* Shapiro v. Thompson *to Take a Hike*, 31 Val. U. L. R. 893 (1997) ("doctrinal mess"); K. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. R. 1414, 1435 (1989) ("difficult to grasp"); T. McCoy, *Recent Equal Protection Decisions — Fundamental Right to Travel or "Newcomers" as a Suspect Class?*, 28 Vand. L. R. 987 (1975) ("logically defective").

B. *Shapiro's* approach has been undermined by later decisions.

Meanwhile, *Shapiro's* approach has long been left behind by the rest of the Court's jurisprudence.[7] In contrast to *Shapiro's* insistence that there was "no occasion to ascribe the source of this right ... to a particular constitutional provision," *id.*, at 630, the Court in more recent years has repeatedly emphasized the importance of grounding constitutional analysis in the appropriate constitutional text. Thus, in *Graham v. Connor*, 490 U.S. 386 (1989), involving a claim of excessive force against police officers, the Court said:

> We reject this notion that all excessive force claims ... are governed by a single generic standard.... In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed.... "The first inquiry in any § 1983 suit" is "to isolate the precise constitutional violation with which [the defendant] is charged."

Id., at 393-94, *quoting Baker v. McCollan*, 443 U.S. 137, 140 (1979) (bracketed matter the Court's). *Cf. Graham*, 490 U.S. at 394-95 (claim of excessive force against free citizen analyzed under Fourth Amendment rather than under substantive due process), *with Whitley v. Albers*, 475 U.S. 312, 318-26 (1986) (claim of excessive force against convicted prisoner analyzed under Eighth Amendment). "Where a particular Amendment

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[7]As one commentator who supports the result in *Shapiro* puts it, "[n]ot surprisingly in light of these [doctrinal] difficulties," *Shapiro* and similar cases "have left a limited legacy." K. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. R. at 1436-37.

'provides an explicit textual source of constitutional protection' against a particular sort of governmental behavior, "that Amendment, not the more generalized notion of substantive due process,' must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (plurality opinion), *quoting Graham*, 490 U.S. at 395 (arrest without probable cause analyzed under Fourth Amendment rather than under substantive due process); *Albright*, 510 U.S. at 281 (Kennedy, J., concurring) (same).

Conversely, the Court has repeatedly expressed its "reluctan[ce] to expand the concept of substantive due process," precisely because "guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). And when the Court has resorted to substantive due process, it has "required a 'careful description' of the asserted fundamental liberty interest," and has been guided by "[o]ur Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, —, 117 S.Ct. 2258, 2268 (1997), *quoting Reno v. Flores*, 507 U.S. 292, 302 (1993). The Court has thus thoroughly repudiated *Shapiro's* approach to constitutional adjudication.

Shapiro's legacy has been similarly limited even in the specific area of social welfare legislation, where the Court has declined to extend *Shapiro's* "penalty" approach, and its accompanying strict scrutiny, even to situations that seem quite similar. Instead, the Court has consistently deferred to legislative choices in these areas, even where those choices might be characterized as "penalizing" the exercise of fundamental rights, and over dissents which specifically invoked *Shapiro* or its progeny. *Dandridge v. Williams*, 397 U.S. 471 (1970), for example, was decided the very Term after *Shapiro*. *Dandridge* upheld Maryland's upper limit on AFDC grants regardless of

family size, *id.*, at 483-87, against a claim that this limit "penalized" the exercise of the fundamental right to procreate. *Id.*, at 521-23 (Marshall, J., dissenting) (citing *Shapiro*). *Accord Maher v. Roe*, 432 U.S. 464 (1977) (state may deny payment for nontherapeutic abortions even though it pays for childbearing); *id.*, at 488 (Marshall, J., dissenting) (citing *Shapiro* and progeny); *Harris v. McRae*, 448 U.S. 297 (1980) (federal government may do the same); *id.*, at 335 (Brennan, J., dissenting) (citing *Shapiro* and progeny); *Lyng v. Int. Union, United Auto., Aerospace and Agricultural Implement Workers of America*, 485 U.S. 360 (1988) (upholding denial of food stamps to striking households); *id.*, at 375 (Marshall, J., dissenting) (citing cases following *Shapiro*).

Thus, the fear that *Shapiro's* approach would "swallow all the traditional deference shown to state economic and social regulation," *Attorney General of New York v. Soto-Lopez*, 476 U.S. at 925 (O'Connor, J., dissenting), has not been realized, but only because *Shapiro* itself has been largely bypassed by later cases. In doctrinal terms, *Shapiro* can now be seen not as seminal, but as an isolated anomaly, out of harmony with what came both before and after. This is an opportune time to correct it because, as we now discuss, *Shapiro*, while narrowly cabined, is neither dead nor harmless.

II. *Shapiro* Continues to Have Deleterious Effects on Government's Efforts to Attack Difficult Social Problems, Especially the Reform of Welfare.

In this Court, time may have passed *Shapiro* by, but it continues to work its mischief in the lower courts, mostly, but not only, in the welfare area. Only two months ago, the Third Circuit became the latest court to invoke *Shapiro* to strike down a two-tier residency statute similar to California's, remarking in

a case from Pennsylvania that:

> We are mindful ... that the opinions in several Supreme Court cases decided since *Shapiro* and *Maricopa County* may call into question the vitality of strict scrutiny review of laws that burden the fundamental right to interstate travel and migration.

Maldonado v. Houstoun, 157 F.3d 179, 1998 WL 569359 (3d. Cir. 1998) at *10. Nevertheless, the Court of Appeals felt bound to apply *Shapiro*, leaving to this Court "'the prerogative of overruling its own decisions.'" *Ibid, quoting Agostini v. Felton*, 521 U.S. 203, —, 117 S.Ct. 1997, 2017 (1997).

Other courts have done the same. Twelve States have so far adopted two-tier residency requirements in response to Congress' invitation,[8] and seven, counting California's and Pennsylvania's, have already been preliminarily or permanently enjoined. *See Hicks v. Peters*, 10 F.Supp.2d 1003 (N.D. Ill. 1998); *Westenfelder v. Ferguson*, 998 F.Supp. 146 (D. R.I. 1998) (granting preliminary injunction), *appeal docketed*, No. 98-1431 (1st Cir. May 14, 1998); *Ruffin v. Quasim*, No. C97-5767 FDB (W.D. Wash. Feb. 6, 1998) (granting preliminary injunction); *Sanchez v. Department of Human Services*, 314 N.J. Super. 11, 713 A.2d 1056 (1998); *Davis v. Doth*, No. 62-C6-97-010231 (Minn. St. Dist. Ct. July 31, 1998), *appeal filed* (Minn. Ct. App. Nov. 3, 1998).

In the Personal Responsibility Act, Congress authorized

[8]*See* Br. of Commonwealth of Pennsylvania, et al., Amicus Curiae in Support of Petition for Certiorari, at 6 n.2 (filed August 19, 1998) (listing state provisions).

the States to adopt two-tier residency schemes because, in Congress' judgment, the former welfare system was a "failure" which could best be reformed by

> giv[ing] States the freedom to innovate in developing income support programs for welfare families that encourage personal responsibility and move welfare recipients into the work force.

H.R. Rep. No. 651, 104th Cong., 2nd Sess. (1996), p. 3, 5. *See* F. Buckley & M. Brinig, *Welfare Magnets: The Race to the Top*, 5 Sup. Ct. Econ. Rev. 141, 150-51 (1997) (arguing that state experimentation will promote identification of optimal welfare policies). In the wake of the Personal Responsibility Act, proposals for state innovation abounded:

> Florida proposes to cut payments for additional children born to welfare mothers; Connecticut and Oregon will subsidize the wages of working welfare recipients; Michigan will sponsor a mentoring program with ties to a religious group; Kentucky will pay moving expenses for those wishing to relocate to work; Arkansas might pay a cash bonus to those who find a job; and Maine will ask caseworkers to make home visits.

Id., p. 151

Congress permitted States to adopt two-tier residency policies in order to promote this innovation, by removing State fears that innovative policies, especially those which involve higher benefits, would attract migrants. "[R]esearch shows that some families move across State lines to maximize welfare benefits. ...States that want to pay higher benefits should not be

deterred from doing so by the fear that they will attract large numbers of recipients from bordering States."[9] H.R. Rep. No. 651, 104th Cong., 2nd Sess. (1996), p. 1337.

Minnesota illustrates Congress' concerns. Minnesota has long focused its reform efforts on getting people not just off welfare, but out of poverty. Its effort is embodied in the Minnesota Family Investment Program (MFIP), which places a heavy emphasis not just on cash assistance, but on child care, employment and training, and has a proven track record of success.[10] *See* Minn. Stat. Ann., §§ 256J.01 *et seq.*

Minnesota has made a significant financial commitment to the MFIP. State appropriations for child care assistance (exclusive of federal funds) have risen from $34.5 million in fiscal year 1996 to $115.6 million in fiscal year 1999, and state funds for employment and training programs increased by $26 million for the 1998-99 biennium. Minn. Laws 1997, c. 162, art. 4, § 3; *id.*, c. 203, art. 1 and 12. In addition, Minnesota's cash assistance levels are among the highest in the Nation, and it

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[9]*See* F. Buckley & M. Brinig, *Welfare Magnets: The Race to the Top*, 5 Sup. Ct. Econ. Rev. at 152, 162 (citing evidence that differential welfare payments influence migration flows); P. Peterson, *Devolution's Price*, 14 Yale L. & Pol'y Rev. 111, 116-17 (1996) (same).

[10]The MFIP began as a pilot program in the late 1980's. After 18 months, 52% of MFIP single parents were employed, compared to 38% of single parents receiving conventional AFDC, and 16% fewer families were in poverty. Manpower Demonstration Research Corp., "Making Welfare Work and Pay: Implementation and 18-Month Impacts of the Minnesota Family Investment Program, p. ES 6-8 (October 1997).

allows recipients to continue to receive benefits for the maximum time — 60 months — allowed by federal law. Minn. Stat. Ann. § 256J.42 (Supp. 1997); *see* 42 U.S.C. § 608(a)(7).

But Minnesota's ability to achieve its goals will be seriously impaired if its innovative and generous program attracts significant migration into the State by families seeking higher welfare benefits. The result, the legislature feared, would likely be "significant reductions in welfare benefits." Minn. Laws 1997, c. 85, art. 1, § 64, subd. 1(10). Minnesota therefore moved to "make welfare benefits a neutral factor in a family's decision to move to Minnesota, which is required for the state to continue its commitment to reform its welfare system and to provide meaningful assistance for needy Minnesota families." *Id.*, subd. 1(8).

Minnesota thus, like many other States, adopted a two-tier residency requirement, only, like other States, to see it enjoined by a court relying on *Shapiro. Davis v. Doth, supra. Shapiro* is thus discouraging the State experimentation which is at the heart of the national effort to reform welfare, as one court after another strikes down two-tier residence schemes.

Worse, *Shapiro's* regime has been associated by some with a so-called "race to the bottom" in which each State in turn *cuts* benefits in order to avoid becoming a "magnet" for welfare recipients. P. Peterson, *Devolution's Price*, 14 Yale L. & Pol'y Rev. 111, 117 (1996).

> The mean benefit paid to a family in the average state climbed from $306 in 1940 to $605 in 1970 (calculated in 1970 dollars). This steady increase was made possible by both steady economic growth and the fact that each state could set its

> policies without worrying too much about what its neighbors were doing.
>
> State AFDC policies began to change around 1970 [the year after *Shapiro* was decided]. ... By 1975, the mean cash benefit in the average state had slipped to $512; by 1985, it had fallen to $393; and by 1993, it had reached its postwar nadir of $349.

Id., at 116. Others disagree. *See* F. Buckley & M. Brinig, *Welfare Magnets: The Race to the Top*, 5 Sup. Ct. Econ. Rev. at 159, 176 (finding little evidence of a "race to the bottom"). Whoever is right, it seems evident that an area so fraught with the potential for unintended consequences demands far more flexibility, and far more deference to the judgment of legislators, than *Shapiro* permits.

In addition, *Shapiro* has surfaced from time to time in other areas, fueling attacks in the lower courts, sometimes successful, on attempts to curb juvenile crime and other societal ills. *See, e.g., City of Chicago v. Morales*, 687 N.E.2d 53, 65 (Ill. 1997), *cert. granted*, 118 S.Ct. 1510 (1998) (striking down gang loitering ordinance); *Nunez v. City of San Diego*, 114 F.3d 935, 944-46 (9th Cir. 1997) (striking down juvenile curfew ordinance); *Lutz v. City of York*, 899 F.2d 255, 258-71 (3d Cir. 1990) (rejecting challenge to anti-cruising ordinance); *Townes v. City of St. Louis*, 949 F.Supp. 731, 734 (E.D. Mo. 1996) (rejecting challenge to ordinance blocking street to vehicles).

Shapiro will not be a dead letter until this Court overrules it. The Court should take this opportunity to remove its distorting influence from our jurisprudence.

III. Considerations of Stare Decisis Do Not Weigh Against Overruling *Shapiro*.

The doctrine of *stare decisis* arises out of the recognition that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. *See* B.Cardozo, *The Nature of the Judicial Process* 149 (1921). Nevertheless, *stare decisis* "is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). While respect for an issue previously decided is a necessity in our judicial system, *stare decisis* is not an "inexorable command" to adhere slavishly to prior decisions, particularly regarding issues of constitutional interpretation. *See Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 405-411 (1932) (Brandeis, J. dissenting).

Considerations of *stare decisis* have the most force in cases concerning statutory interpretation, for if the Court misinterprets a statute the legislature can amend it to make its intentions clear. But where the Court decides a constitutional issue, the Court "to a great extent, place[s] the matter outside the arena of public debate and legislative action." *Washington v. Glucksberg*, 521 U.S. at —, 117 S.Ct. at 2268. Since "correction through legislative action is practically impossible," *Coronado Oil & Gas Co.*, 285 U.S. at 407, *stare decisis* is at is weakest in constitutional cases like this one. *Agostini v. Felton*, 521 U.S. at —, 117 S.Ct. at 2016.

The time is ripe for the Court to review *Shapiro*, and *stare decisis* should not stand in the way. First, "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent,'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), *quoting Smith v. Allwright*, 321 U.S. 649, 665 (1944), and as we have already explained, *Shapiro* is

both. *Shapiro* was an anomaly even when it was decided; since then, developments in the law have "left it behind as a mere survivor of obsolete constitutional thinking." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 857 (1992). Second, "*stare decisis* has special force when legislators or citizens have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." *Hubbard v. United States*, 514 U.S. 695, 713 (1995). Here, however, reliance interests would seem to be "notably modest," *ibid*: not only is adherence to *Shapiro* doing more harm than good, *supra* at 13-18, but, as we now discuss, overruling *Shapiro* in favor of a return to more traditional modes of constitutional adjudication would sacrifice little real protection for individuals.

IV. Claims Involving Travel Should Be Measured by the Usual Tools of Constitutional Adjudication: Text and Tradition.

The *amici* States do not suggest that the Constitution does not protect travel; clearly it does. For over a century before *Shapiro*, the Court vindicated claims involving the right to travel, in decisions grounded in the text of the Constitution. *See supra* at 4-6.

The dormant Commerce Clause, for example, obviously offers powerful protection against any attempt by a State to fence itself off from the rest of the Nation, or to discriminate against those who come from other States as either migrants or travelers. *E.g., Edwards v. California, supra; Camps Newfound/ Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, —, 117 S.Ct. 1590, 1596 (1997) (Commerce Clause protects summer camp whose customers come from out of state, citing *Edwards*).

Congress, however, may authorize the States to do what the Commerce Clause otherwise forbids, thus providing a measure of flexibility which is especially valuable in a case such as is now before the Court. Congress can identify and accommodate competing interests — the burden on interstate migration versus the need to encourage innovation and reform, for example — in a way which the relative rigor of constitutional doctrine cannot.

The Court has encountered this situation before. In *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967), the Court considered a State's attempt to require an out-of-state mail-order house to collect a use tax on goods purchased for use within the State. The Court held that, unless the mail-order house had some physical presence within the State, such attempts violated both the Due Process Clause and the dormant Commerce Clause. A quarter of a century later, in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Court overruled the due process aspect of *National Bellas Hess* because it had been "superseded by developments in the law of due process." 504 U.S. at 308. The Court reaffirmed, however, *National Bellas Hess'* holding on the Commerce Clause, a decision

> made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions.

504 U.S. at 318.

Other specific constitutional provisions — the Privileges

and Immunities Clauses, and even the Fourth Amendment's prohibition against arrests without probable cause — each, in its appropriate sphere, but also subject to its appropriate limits, may come into play to protect the right to travel in a given case. Beyond these specific provisions, the right to travel is undoubtedly an aspect of the "liberty" protected by the Due Process Clause of the Fifth — and presumably, the Fourteenth — Amendment, *Kent v. Dulles, supra*, but subject to governmental regulation "if the provision is rationally based." *Califano v. Azavorian*, 439 U.S. 170, 178 (1978) (upholding limitation on Social Security benefits against right-to-travel-abroad challenge, citing *Dandridge v. Williams, supra*).

The *amici* have no quarrel with any of this. But they do submit that the time has come to abandon *Shapiro's* ill-conceived attempt to construct a generic, free-floating "right to travel," and to abandon as well its dismissal of legitimate governmental interests by simple *ipse dixit*.

CONCLUSION

The Court should reverse the judgment of the Court of Appeals.

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No. 98-97

In the

Supreme Court of the United States

October Term, 1998

ELOISE ANDERSON, Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; and CRAIG L. BROWN, Director, California Department of Finance,

Petitioners,

v.

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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IDENTITY AND INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in Support of Petitioners Eloise Anderson, *et al.*[1] Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is submitting this brief because it believes its public policy perspective and litigation experience in the welfare reform arena will provide an additional viewpoint with respect to the issues presented. PLF has participated in numerous cases before this Court, including the previous incarnation of this case, *Anderson v. Green*, 513 U.S. 922 (1994), as well as other welfare reform cases such as *Lascaris v. Shirley*, 420 U.S. 730 (1975), and *Geduldig v. Aiello*, 417 U.S. 484 (1974).

PLF believes that the welfare reform act of 1996, officially titled the "Personal Responsibility and Work Opportunity Reconciliation Act of 1996," has essentially wiped the welfare slate clean. After more than 60 years of tinkering with a welfare system that has proven to be counterproductive and beyond repair, the federal welfare act states that its purpose is to increase flexibility of states in operating a program designed to, among other things, end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage. 42 U.S.C. § 601(a)(2). The federal welfare reform act allows the states to conduct novel social and economic experiments. California's statutory provision restricting welfare

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

benefit levels distributed to new residents during their first year of arrival in a state to the amount received in their state of origin is such an experiment. It is part of California's experimental project to end welfare dependency. In deference to the principles of federalism, California's experiment should be allowed to continue.

SUMMARY OF ARGUMENT

The welfare reform act of 1996, expressly provides block grants to states in order to encourage state innovation. Instead of an open-ended system encouraging welfare as a way of life, the Act states that its purpose is to increase the flexibility of states in operating a program designed to, among other things, end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage. California responded to this congressional change of direction by implementing various provisions including California Welfare and Institutions Code § 11450.03. Section 11450.03 generally provides new residents the same amount of welfare benefits that they were eligible to receive before moving to California. Out of deference to principles of federalism and in recognition that states should be allowed a certain amount of freedom to conduct novel social experiments, California's efforts to transform its broken welfare system by maintaining newcomers at the same amount of welfare benefits they were eligible to receive in their former state of residence for 12 months should be allowed to continue.

The proper standard of review of Section 11450.03 should be the traditional, rational basis equal protection test. Under this analysis, legislatures must be free to do their work, which at times requires drawing distinctions between individuals. The role of the courts is generally a deferential one where courts do not second-guess the wisdom or efficacy of legislative action, but merely seek to ensure its rationality. This Court should rule that in the interest of discouraging welfare dependency, states

should be allowed to experiment with different benefit levels, while at the same time providing a safety net for residents, without regard to the duration of their residency.

The Ninth Circuit and the trial court relied upon *Shapiro v. Thompson*, 394 U.S. 618 (1969), and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), in holding that Section 11450.03 is subject to strict scrutiny analysis based on their finding that the statute imposes a penalty on the right to travel and the state failed to show a compelling state purpose. *Roe v. Anderson*, 134 F.3d 1400, 1404 (9th Cir. 1998). Yet, the equal protection analysis of *Shapiro* and *Memorial Hospital* need not, and should not, control the outcome of this litigation. The analysis of *Shapiro* has lost its vitality over time and should not be applied. This Court has applied a variety of different analyses to right to travel issues, thus undermining the controlling precedential effect of any one line of analysis. *Shapiro* was based on a strict scrutiny, equal protection analysis. *Memorial Hospital* emphasized the concept of a "penalty" in the strict scrutiny analysis. *Sosna v. Iowa*, 419 U.S. 393, 419 (1975), applied an "ad hoc balancing test." *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), and *Zobel v. Williams*, 457 U.S. 55 (1982), were decided under a rational basis review. Justice O'Connor has twice advocated a two-pronged test based on the Privileges and Immunities Clause of Article IV of the Constitution. *Zobel*, 457 U.S. at 71-81 (O'Connor, J., concurring in the judgment); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986) (O'Connor, J., dissenting). Other cases have held that welfare legislation is ordinarily subjected to rational basis review. *Dandridge v. Williams*, 397 U.S. 471 (1970); *Jefferson v. Hackney*, 406 U.S. 535 (1972). Unlike *Shapiro* and its progeny, Section 11450.03 does not impose an absolute bar to the receipt of benefits by recent migrants. Instead, only minimal delay in receiving an *increase* in benefits is imposed. *Shapiro* and its progeny need not, and should not, control the outcome of this litigation.

STATEMENT OF THE FACTS

In 1996, Congress fundamentally changed the nature of the American welfare system by repealing, among other things, the Aid to Families with Dependent Children program and replacing it with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 601, *et seq*. ThisAct gives states broad authority to design and implement their own welfare systems. In doing so, Congress aimed to increase the flexibility of the states to experiment with their welfare systems, with the ultimate goal of encouraging recipients to find work and end dependence on welfare. *See* 42 U.S.C. § 601.

Among its provisions, the federal welfare reform act changed the basic funding format. Funding for a state's welfare program is provided through block grants to states with certified Temporary Assistance to Needy Families (TANF) plans. In addition, the federal welfare reform act expressly authorizes states to limit welfare benefits to new residents to the amount that such persons received in their prior state of residence for up to 12 months after relocation. 42 U.S.C. § 604(c).

Following this congressional change in direction, California resurrected Welfare and Institutions Code § 11450.03.[2] This statute provides that newcomers to California would receive the same level of welfare benefits for 12 months that they were eligible to receive in their former state. Section 11450.03 provides:

[2] Welfare and Institutions Code § 11450.03 was the subject of previous litigation prior to enactment of the federal welfare reform act. The federal district court and Ninth Circuit Court of Appeals struck down the statute as violating the right to travel (*Green v. Anderson*, 26 F.3d 95 (9th Cir. 1994)), and this Court granted review of the case. However, the case was dismissed and the judgment of the Ninth Circuit vacated when the federal waiver was withdrawn. *Anderson v. Green*, 513 U.S. 557, 560 (1995).

> (a) Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.

Two applicants for California welfare benefits, representing a certified class of all new residents to California, challenged this statute as violating the right to travel under the United States Constitution. *Roe v. Anderson*, 134 F.3d at 1403. The applicants remained *eligible* to receive welfare benefits, but California, in adopting Section 11450.03, made the decision not to *increase* newcomers' benefit levels. Instead, new California residents receive, for one year, the same amount of welfare benefits they received in their state of prior residence. *Id.* The district court, relying on its previous ruling in *Green v. Anderson*, granted the preliminary injunction based on a finding that Section 11450.03 penalizes the right to travel. *Roe v. Anderson*, 966 F. Supp. 977 (E.D. Cal. 1997).

The Ninth Circuit affirmed the lower court ruling. Relying on *Shapiro*, the Ninth Circuit ruled that Section 11450.03 places a penalty on the right to travel and that the state failed to show a compelling state purpose. *Roe*, 134 F.3d at 1404.

ARGUMENT

I

CALIFORNIA SHOULD BE ALLOWED TO CONDUCT ITS NOVEL EXPERIMENT

The welfare reform act of 1996 makes major changes in the administration of welfare. Instead of a federally micro-managed system required to be nationally uniform, the federal welfare reform act now provides block grants to the states in order to encourage state innovation. Instead of an open-ended system

encouraging welfare as a way of life, the Act states that its purpose is to increase the flexibility of states in operating a program designed to, among other things, end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage. 42 U.S.C. § 601(a)(2). This change of direction allows the states to conduct novel social and economic experiments.

In response to this new grant of state flexibility in the field of welfare reform, California began its experimental project to reform welfare dependency and, among other things, implement the provisions of Section 11450.03. Section 11450.03 generally provides new residents the same amount of welfare benefits that they were eligible to receive before moving to California.

In ruling on the validity of this state statute, this Court should be mindful of the concept of federalism. The United States is composed of sovereign units of government entitled to a certain amount of latitude in order to experiment with novel solutions to social and political problems. The idea that federalism allows the states to conduct novel social and economic experiments, was first expressed by Justice Brandeis. His eloquent statement on this subject bears repeating:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. . . . But in the exercise of this high power, we must be ever on our guard lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandies, J., dissenting). *Accord, San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 49-50 (1973); *United States v. Lopez*, 514 U.S. 549 (1995) (Kennedy, J., concurring) ("In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.").

Indeed, Justice Harlan recognized the need to allow states to conduct novel social and economic experiments in the area of welfare reform.

> [T]he field of welfare assistance is one in which there is a widely recognized need for fresh solutions and consequently for experimentation. Invalidation of welfare residence requirements might have the unfortunate consequence of discouraging the Federal and State Governments from establishing unusually generous welfare programs in particular areas on an experimental basis, because of fears that the program would cause an influx of persons seeking higher welfare payments.

Shapiro, 394 U.S. at 674-75 (Harlan, J., dissenting).

After more than 60 years of tinkering with a welfare system that has proven to be counterproductive and beyond repair, Congress has given the states the opportunity for a fresh start by adopting the welfare reform act. In so doing, President Clinton announced that

> this legislation provides an historic opportunity to end welfare as we know it and transform our broken welfare system by promoting the fundamental values of work, responsibility, and family.

1996 WL 648450 (Leg. Hist.).

California embraced the congressional mandate for state innovation in the field of welfare reform. In an effort to transform a broken system that traps too many people in a cycle of dependence to one that emphasizes work and independence, California developed an experimental project including Section 11450.03.[3]

Unfortunately, California's experiment in the field of welfare reform has been placed on hold. This Court should rule that in the interest of discouraging welfare dependency, states should be allowed to experiment with different benefit levels while at the same time providing a safety net for residents, without regard to the duration of their residency.

II

SECTION 11450.03 SHOULD BE UPHELD UNDER RATIONAL BASIS REVIEW

A. Welfare Legislation Is Subject to Rational Basis Review

California's residency-based benefit level statute easily passes rational basis review under the Equal Protection Clause. The Equal Protection Clause of the Fourteenth Amendment, Section 1, commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

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[3] Maintaining newcomers at the same amount of welfare benefits they were eligible to receive in their former state for 12 months would also reduce overall welfare expenditures. Declaration of Dennis Hordyk attached to the Declaration of Theodore Garelis, Petition for Writ of Certiorari, Appendix (App.) 44. In fiscal year 1995-96, California provided $6 billion in public welfare assistance. Although it has only 12% of the nation's population, California accounts for 29% of all money spent nationwide on public welfare assistance, and its monthly average caseload of 2,645,814 persons is 20% of the national public welfare assistance caseload. Wagstaff Declaration at App. 26.

Controlling precedent from this Court holds that statutes involving public welfare assistance are subject to rational basis review.

Dandridge v. Williams, 397 U.S. 471, addressed an equal protection challenge to a Maryland state statute that limited public welfare assistance to families. The Court established the following test:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." . . . "The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific." "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Id. at 485 (citations omitted). The Court recognized that public assistance programs may give rise to inequalities in their design and administration. Nonetheless, the Court ruled:

> But the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination.

Id. at 486-87 (citations omitted). In upholding the state welfare scheme, the Court explicitly stated it was not ruling that the Maryland policy before it was wise or best fulfilled the relevant social and economic objectives the state might ideally espouse, nor that it was the most humane and just system that could be devised.

> But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

Id. at 487 (citations omitted).

In *Jefferson v. Hackney*, 406 U.S. 535, the Texas policy of providing a lower percentage of the state's total pool of welfare benefits to families with dependent children than was provided to aged, blind, or disabled adult recipients was attacked as violating the Equal Protection Clause. Applying traditional rational basis analysis, the Court held the disparities were neither irrational nor invidious. *See id.* at 547. This Court ruled that state legislatures are permitted to address an issue one step at a time without necessarily running afoul of the Constitution:

> [T]he legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them.

Id. at 546-47 (citation omitted). This Court in *Jefferson* specifically addressed the question of providing a lower percentage of payment to certain classes of recipients.

> Since budgetary constraints do not allow the payment of the full standard of need for all welfare recipients, the State may have concluded that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living. While different policy judgments

> are of course possible, it is not irrational for the State to believe that the young are more adaptable than the sick and elderly . . . . Whether or not one agrees with this state determination, there is nothing in the Constitution that forbids it.

Id. at 549.

By analogy, it is not irrational to believe that welfare dependence will be reduced if California stops serving as a "welfare magnet," attracting indigent migrants from states with lower benefit levels. Nor is it irrational to believe that new residents are not disadvantaged by receiving the same amount of public welfare assistance as they received in their original state of residence (as well as additional California benefits that may or may not have had counterparts in the original state). *See* Wagstaff Declaration at App. 38 (new residents may be eligible for a Special Needs Allowance for homeless assistance, full Medicaid benefits, and food stamps).

B. Section 11450.03 Passes Rational Basis Review

Departing from the precedent this Court established in *Dandridge* and *Jefferson*, the Ninth Circuit and the trial court relied upon *Shapiro* and its progeny in holding that Section 11450.03 should be subject to strict scrutiny analysis. *Roe*, 134 F.3d at 1404. In *Shapiro*, this Court held that legislation which denied welfare benefits outright to new state residents of less than one-year duration was constitutionally impermissible because, such legislation "touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest." *Shapiro*, 304 U.S. at 638. The Court determined that the complete denial of welfare assistance for a full year penalized the plaintiffs' right of interstate movement. *Id.* at 364. By contrast, however, Section 11450.03 imposes no absolute bar to the receipt of benefits by recent migrants. Instead, only

minimal delay in receiving an *increase* in benefits is imposed. Additionally, Section 11450.03 is rationally related to furthering the state's legitimate interest in ensuring that the state's limited public assistance resources are distributed as equitably as possible.

Whether Section 11450.03 constitutes a wise welfare policy is a decision the United States Congress has given to the states. The role of the courts is generally a deferential one where courts do not second-guess the wisdom or efficacy of the legislative action, but merely seeks to ensure its rationality. This Court should rule that in the interest of discouraging welfare dependency, states should be allowed to experiment with different benefit levels while at the same time providing a safety net for residents, without regard to the duration of their residency. Section 11450.03 should be upheld.

III

SHAPIRO AND ITS PROGENY ARE NOT CONTROLLING IN THIS CASE BECAUSE NO FUNDAMENTAL RIGHT IS BURDENED BY A LAW THAT LEAVES MIGRANTS EQUALLY WELL OFF AS IF THEY HAD REMAINED IN THEIR PRIOR STATE OF RESIDENCE

A. The Law at Issue Does Not Impose an Eligibility Bar to New Migrants

Shapiro v. Thompson is the hook on which the court below hung its hat. *Roe*, 134 F.3d at 1404. *Shapiro* invalidated a one-year residency requirement imposed before *any* welfare benefits could be collected. Applying strict scrutiny, the Court found no compelling state interest capable of justifying the requirement. *Shapiro*, 394 U.S. at 641. The Court held that requiring new residents to wait one year before receiving *any* welfare benefits constituted invidious discrimination between new and longtime residents, and that if a law had no other purpose than chilling the

exercise of a constitutional right such as that of migration of needy persons into the state, the law was impermissible. *Id.* at 627, 631. Further,

> any classification which serves to penalize the exercise of [the right of migration], unless shown to be necessary to promote a *compelling* government interest, is unconstitutional.

Id. at 634 (emphasis added). The Court held that constitutional concepts require that all citizens

> be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.

Id. at 629.

Yet, the Court did not analyze the statutes at issue in the light of an "unreasonable burden or restriction." Rather, it invoked the usually fatal strict scrutiny and found the state's reasons noncompelling. Justice Harlan, in his *Shapiro* dissent, identified the problems with this analysis. Because "[v]irtually every state statute affects important rights," the fundamental rights strand of equal protection doctrine "creates an exception which threatens to swallow the standard equal protection rule." 394 U.S. at 661 (Harlan, J., dissenting). Justice Harlan continues:

> When the right affected is one assured by the Federal Constitution, any infringement can be dealt with under the Due Process Clause. But when a statute affects only matters not mentioned in the Federal Constitution and is not arbitrary or irrational, I must reiterate that I know of nothing which entitled this Court to pick out particular human activities, characterize them as "fundamental," and give them

> added protection under an unusually stringent equal protection test.

Id. at 662.

Despite *Shapiro's* logical and textual failings, the Court directly applied its rationale in two subsequent cases. In *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972), a waiting period requirement for voting was struck down because "such laws force a person who wishes to travel and change residences to choose between travel and the basic right to vote." The question arose as an equal protection issue. The Court found that a law requiring one year of state residence and three months of county residence before an individual could register to vote *penalized* the exercise of the right to travel by temporarily depriving persons who moved across state lines of their right to vote. *Dunn*, 405 U.S. at 342. *Dunn*, too, emphasized strict scrutiny as the measure of the constitutionality of the law, *id.* at 343, and said that it applies to any classification that "penalizes" the right to travel regardless of legislative intent or actual deterrence. *Id.* at 340-41.

The Court's focus on whether the law directly burdened, by penalizing, the right to interstate travel continued in *Memorial Hospital v. Maricopa County*. That case struck down a one-year waiting period requirement before new residents were eligible for state-paid indigent, nonemergency medical care. *Memorial Hospital*, 415 U.S. at 254. The Court held that the statute penalized the right to interstate travel because medical care is as much "'a basic necessity of life'" to an indigent as the welfare assistance that was at issue in *Shapiro*. *Id.* at 259. The Court found that the right of interstate travel must be seen as ensuring new residents the same right to vital government benefits and privileges in the states to which they migrate as are enjoyed by other residents. *Id.* at 261.

Memorial Hospital, 415 U.S. at 262 n.21, distinguishes *Dandridge* on the basis that the classification in *Dandridge* did not impinge upon a fundamental right. *See Graham v. Richardson*, 403 U.S. 365, 376 (1971). Yet, in *Memorial Hospital*, Justice Rehnquist pointed out the potential race to the bottom that could result as an unintended consequence of the Court's opinion. *Memorial Hospital*, 415 U.S. at 279 (Rehnquist, J., dissenting). *See also* Todd Zubler, *The Right to Migrate and Welfare Reform: Time for Shapiro v. Thompson to Take a Hike*, 31 Val. U. L. Rev. 905, 933-38 (1997) (logical result of *Shapiro* and its progeny is that each state will avoid having more generous benefits that any other state to avoid (1) being a welfare magnet and (2) running into constitutional problems created by *Shapiro*'s application of strict scrutiny to all disparities in benefits). Thus, on the one hand, the Court says it will resist the temptation to become a superlegislature and allow the states to make the public assistance decisions; while on the other hand, the *Shapiro* line of cases severely curtails the options available to the states. *Id.* at 287 (Rehnquist, J., dissenting).

In the above cases, the plaintiffs' right to travel was penalized because they were put in a worse position by application of the statutes at issue after they moved to their new states. Unlike *Shapiro* and its progeny, Section 11450.03 does not impose an absolute bar to the receipt of benefits by recent migrants. California has no waiting period to establish eligibility. New California residents are immediately eligible for benefits under the state's TANF program.

B. No Majority of This Court Has Invoked *Shapiro's* Strict Scrutiny Since *Memorial Hospital*

Shapiro and its progeny threatened catastrophic effects on the states' abilities to determine their own welfare policies. However, this Court has been distinguishing the *Shapiro* line of cases on a number of bases since 1975.

The first case to signal a relaxation of *Shapiro's* strict scrutiny is *Sosna v. Iowa*, where an Iowa statute requiring one year of continuous residence before filing a petition for divorce was upheld. *Sosna*, 419 U.S. at 395. Citing two factors, the Court distinguished *Shapiro*, *Dunn*, and *Memorial Hospital*. First, a delay in getting a divorce did not "irretrievably foreclose[]" anyone from ultimately obtaining it, unlike the prior cases where some benefits never would have been recovered. 419 U.S. at 406. Second, the state's residency requirement was not justified by mere budgetary considerations but by the state's need to control domestic relations, an area long regarded as being the exclusive province of the states. 419 U.S. at 404. Iowa's state interest was to ensure recognition of its divorce decrees by other states under the Full Faith and Credit Clause of the Constitution. This was considered a more potent state interest than fiscal matters. The Court upheld the statute without specifying a standard of review. The opinion balanced the state interest in favor of the statute against the burden on the right to travel, concluding that the former outweighed the latter. *Id.* at 406, 409-10. The Court emphasized that the gravamen of Sosna's claim was not a *total deprivation*, but only delay. *Id.* at 410.

Sosna threw considerable doubt on the viability of the *Shapiro* line of cases.[4] Justice Marshall, in dissent, said the majority opinion "departs sharply" from *Shapiro*, substituting an "ad hoc balancing test" for strict scrutiny. *Sosna*, 419 U.S. at 418-19 (Marshall, J., dissenting). Since *Sosna*, the Court has not used an "ad hoc balancing test" in right to travel cases. *See* Zubler, *The Right to Migrate*, 31 Val. U. L. Rev. at 905.

Zobel v. Williams, 457 U.S. 55, continued the shift away from *Shapiro's* analysis under the Equal Protection Clause of the Fourteenth Amendment. Some analysts suggest that it contorted

[4] *See also Vlandis v. Kline*, 412 U.S. 441, 452-54 (1973) (upholding waiting period to qualify for resident tuition at state universities).

the rational basis review in the process.[5] Applying neither the *Shapiro* strict scrutiny analysis nor the *Sosna* balancing test, *Zobel* invalidated Alaska's scheme that distributed oil revenues to residents based on how long they had lived in Alaska. The oil reserve dividend varied in amount based on the length of each citizens' residence. *Id.* at 57, 65. The Court did not find it necessary to apply strict equal protection scrutiny to determine whether the program penalized the exercise of the right to travel, instead holding that the benefit scheme did not pass the rational basis test. *Id.* at 60-61, 65.[6] The Court found that two of Alaska's legislative justifications were not rationally related to the distinctions made in the statute and that the third justification--rewarding citizens for past contributions--was not a legitimate state purpose. *Id.* at 62-65. The Court distinguished the *Shapiro* line of cases because the Alaska statute did not impose any threshold waiting period before receiving benefits; rather, it created "fixed, *permanent* distinctions" between all residents of Alaska, depending on how long they have been in the state. *Id.* at 59 (emphasis added).

Zobel is notable for Justice O'Connor's concurrence, which recognized that "[n]othing in the Equal Protection Clause itself . . . declares this objective [rewarding past citizen contributions] illegitimate." *Id.* at 73 (O'Connor, J., concurring). Instead, she

[5] Zubler, *The Right to Migrate*, 31 Val. U. L. Rev. at 906.

[6] Professor Tribe observes that the Court used an enhanced review that appears

> more the result of dissatisfaction with the existing tools of equal protection analysis for dealing with [discrimination against newcomers] than of any overall shift in the Court's scrutiny of how well various purposes fit legislatively chosen means.

Lawrence H. Tribe, *American Constitutional Law* § 16-2, at 1441-42 (2d ed. 1988).

suggested using a very different analysis based on the Privileges and Immunities Clause of Article IV of the Constitution. *Id.* at 74-78. She argued that a statute must satisfy a two-part test if it burdens a nonresident or new resident who seeks to engage in an essential activity or exercise a basic right. *Id.* at 76. First, there must be "'something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed.'" *Id.* (citation omitted). Second, the Court must find a substantial relationship between the evil and the discrimination practiced against the noncitizen. *Id.* Applying this test, Justice O'Connor found that the asserted "evil" of "partaking in current largesse without having made prior contributions" was not substantially related to the "cure" because some people who migrated to Alaska may have contributed significantly more to the state, both before and after their arrival, than have some of the natives. *Id.* at 77-78.

This Court's most recent right to migrate decision adds yet another dose of confusion to the case law. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, elevates public employment to the same level as the "necessities of life" analyzed in *Shapiro* and *Memorial Hospital*. *Soto-Lopez* struck down a civil service employment preference for veterans who lived in New York when they entered the service. The case generated several opinions. Only four justices (Brennan, Marshall, Blackmun, and Powell) held that the right to travel was violated. The penalty analysis in *Soto-Lopez* concentrated on the fact that the immigrant veterans were *permanently* barred from receiving civil service bonus points. *Id.* at 909. The plurality opinion found a "guiding principle" to tie together the various analyses described above: the right to migrate protects residents of a state from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from other similarly situated residents. *Id.* at 904. That said, however, the plurality promptly "inferred" a penalty on interstate migration and returned to strict scrutiny review. *Id.* at 908. Chief Justice

Burger and Justice White concurred, but only on the ground that New York's program failed *Zobel's* minimum rationality test.

Justices O'Connor, Rehnquist, and Stevens dissented, arguing (1) that New York's program passed equal protection rational basis scrutiny finding any impact on the right to travel to be "ephemeral," *id.* at 923-24 (O'Connor, J., dissenting), and (2) that the program's minimal effect on interstate migration was insufficient to invoke the higher scrutiny of the Privileges and Immunities Clause of Article IV. *Id.* at 920.

Unlike the plaintiffs in the above cases who were handicapped by the creation of permanent distinctions among residents and newcomers, in California, newcomers will continue to be *eligible* for TANF benefits. Section 11450.03 merely set the level of cash aid for those eligible to receive public welfare assistance.

C. Failure to Halt the Expansive *Shapiro* Doctrine Leads to the Creation of Ever More "Fundamental" Rights

As demonstrated by the case summaries above, the right to travel is a free floating doctrine. It encompasses more and more state activity until it so firmly ties the hands of the states that they are incapable of performing even the most fundamental budgetary functions.

The formulation of the right to travel doctrine that forbids any restriction on a "necessity of life" has already been stretched well beyond the basics. *Memorial Hospital* began this trend with its announcement that *nonemergency* medical care was a "necessity of life"; *Soto-Lopez* relaxed the "necessity of life" requirement for strict scrutiny to any "very important" benefit. *Soto-Lopez*, 476 U.S. at 907 (civil service examination bonus points). *See also Hassan v. East Hampton*, 500 F. Supp. 1034, 1041 (E.D.N.Y. 1980) (applying strict scrutiny to a one-year

waiting period to obtain commercial shellfish license applicable to only a portion of the available shellfishing lands).

Moreover, certain courts are no longer content to limit the "fundamental right" to travel to the context of interstate travel; now some courts (and commentators) argue that *Shapiro* requires application of strict scrutiny to *any* statute which may impede movement of any kind within a state. *See, e.g., Lutz v. City of New York*, 899 F.2d 255 (3d Cir. 1990) (cruising ordinance struck down); Andrew C. Porter, *Toward a Constitutional Analysis of the Right to Intrastate Travel*, 86 Nw. U. L. Rev. 820, 821 (1992) (arguing that fundamental right to interstate travel has as a necessary corollary the right to intrastate travel).

In the case at bar, respondents would have this Court expand the right to travel to include an obligation on the state to subsidize welfare recipients with the means to enjoy that right. They are arguing that California is constitutionally obligated to fund their move. As a general matter, a state is under no duty to subsidize the costs of the exercise of constitutional rights. In *Harris v. McRae*, 448 U.S. 297, 317-18 (1980), the Supreme Court held that a woman's freedom of choice does not carry with it a constitutional entitlement to the financial resources necessary to exercise that freedom. Here, California has not prohibited travel or placed a substantial obstacle in the way of a newcomer's move to California; it has simply decided not to increase the government aid above what a newcomer received, or would have received, in their state of prior residence, thereby declining to subsidize the newcomer's travel. The temporary, nondrastic restriction at issue in this case should *not* be subsumed into the amorphous (and expanding) "fundamental" right to travel.

IV

SECTION 11450.03 DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE

Section 11450.03 does not violate the Privileges and Immunities Clause of either Article IV or the Fourteenth Amendment. This Court in *Zobel v. Williams*, 457 U.S. 55, ruled that the Privileges and Immunities Clause was not even implicated unless the regulation in question established a durational residency requirement as a condition of eligibility for some state program. *Zobel*, 457 U.S. at 58-59. That is not the case under Section 11450.03. There is no eligibility bar to recent migrants. Instead, recent arrivals are treated exactly the same as they were treated in their state of origin. For all practical purposes, the decision to migrate simply effects no change in the amount of welfare benefits to which interstate migrants may be entitled. Thus, under the analysis of the majority opinion in *Zobel*, this law does not violate the Privileges and Immunities Clause of the Constitution. Even under the alternate analysis employed by Justice O'Connor in her concurring opinion in *Zobel*, this law survives scrutiny.

Justice O'Connor's analysis did not rely on whether the measure imposed a durational residency requirement as a condition of eligibility. Instead, she would test all laws that distinguish between residents by the duration of their residency according to the test laid out in *Baldwin v. Montana Fish and Game Commission*, 436 U.S. 371 (1978). *Zobel*, 457 U.S. at 76 (O'Connor, J., concurring). The issue under that decision is whether the state is making an unnecessary distinction between residents and nonresidents who seek to "'engage in an essential activity or exercise a basic right.'" *Id.* (quoting *Baldwin*, 436 U.S. at 387). *Baldwin* does not list or describe the range of activities that may be "essential" or that involve a "basic right"

beyond noting that they are activities "sufficiently basic to the livelihood of the Nation." *Baldwin*, 436 U.S. at 388.

Such a right is not at stake in this controversy. This case does not concern the right to receive temporary assistance, rather only the amount of assistance that can be received. Receipt of the maximum grant possible is neither an essential activity nor a basic right. Nor does pursuit of the largest possible welfare payment affect the "livelihood of the Nation." California has crafted a regulation, consistent with congressional policy, to ensure that migrants to the state are treated no differently with regard to welfare grant levels than they were treated in their state of origin. This policy does not deprive migrants' basic rights. Instead it preserves the status quo. The Privileges and Immunities Clause is not violated by such a carefully crafted policy.

In California, newcomers will continue to be *eligible* for TANF benefits, restricted to the amount the newcomers would receive from their state of prior residence for 12 months. Section 11450.03 does not operate as a bar to the receipt of public welfare assistance. The proper analysis is under the rational basis analysis and the controlling precedent of *Dandridge*.

CONCLUSION

The Personal Responsibility and Work Opportunity Act of 1996 has essentially wiped the welfare slate clean. After more than 60 years of tinkering with a welfare system that has proven to be counterproductive and beyond repair, the states have been given the opportunity to experiment with fresh solutions. California's efforts to transform its broken welfare system included maintaining newcomers at the same amount of welfare benefits they were eligible to receive in their former state of residence for 12 months. In the interest of discouraging welfare

dependency states should be allowed to experiment with different benefit levels, while at the same time providing a safety net for residents without regard to the duration of their residence. For the reasons described above, the Ninth Circuit's decision should be reversed.

DATED: November, 1998.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ELOISE ANDERSON, California Department of Social Services, *et al.*,
Petitioners,

v.

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

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BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, U.S. REP. JOHN DOOLITTLE, CALIF. SENS. RAY HAYNES, RICHARD MOUNTJOY AND MAURICE JOHANNESSEN, AND CALIFORNIA ASSEMBLYMEN BILL MORROW AND BERNIE RICHTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a federally-authorized State statute that establishes a reduced level of public assistance benefits during the recipient's first 12 months of residence in the State is subject to heightened scrutiny under the Equal Protection Clause, where the benefit level is no lower than the benefits the recipient would have received in his/her former State of residence.

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INTERESTS OF THE *AMICI CURIAE*

WLF is a nonprofit public interest law and policy center with supporters in all 50 states, including many in California.[1] While WLF engages in litigation in a wide variety of areas, WLF devotes a substantial portion of its resources to issues involving the interests of voters and taxpayers and efforts to ensure the prudent expenditure of tax dollars. Toward that end, WLF has participated in numerous cases in this and other federal and state courts in cases involving the administration of social service programs. *See, e.g., C.K. v. New Jersey Dep't of Health and Human Services,* 92 F.3d 171 (3d Cir. 1996). WLF filed a brief in this case when it was before the U.S. Court of Appeals for the Ninth Circuit and in support of the Petition. WLF also participated in a predecessor to this case when the prior case was before this Court; WLF filed briefs both in support of the certiorari petition and on the merits. *Anderson v. Green,* 513 U.S. 557 (1995).

The Allied Educational Foundation is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Rep. John Doolittle is a Member of the U.S. House of Representatives; Senators Ray Haynes, Richard L. Mountjoy, and K. Maurice Johannessen are Members of the California Senate; Assemblymen Bill Morrow and Bernie Rich-

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

ter are Members of the California Assembly. All strongly support California's position in this case.

Amici believe that the ruling below unnecessarily and detrimentally limits California's ability to carry out the budget cuts that have been made necessary by its fiscal difficulties. *Amici* do not believe that it is the proper role for the federal courts to micromanage public assistance programs, particularly where (as here) the challenged program serves rational State policy objectives.

Amici submit this brief in support of Petitioners with the written consent of all parties.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Facts contained in Petitioners' Brief.

In brief, this suit is a challenge to the constitutionality of California Welfare and Institutions Code § 11450.03, which specifies public assistance benefits to be provided to families that have recently arrived in California.[2] Adopted at a time of fiscal crisis, § 11450.03 is part of the state

[2] Section 11450.03 provides in relevant part:

(a) Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.

legislature's larger effort to ensure that the State's diminished public assistance resources are distributed as equitably as possible. Section 11450.03 provides that an eligible family arriving in California from another State shall, during its first 12 months of residence, receive as benefits the lesser of: (1) the benefit level available to similarly situated, long-term California residents; or (2) the benefit level the family would have been eligible to receive in their prior State, had the family not moved to California.

Respondents are two women who moved to California during 1996-97. Both became eligible for public assistance benefits, but were informed by state officials that their benefit levels would (temporarily) be somewhat lower than benefits provided to similarly situated long-term California residents. Respondents assert that § 11450.03 violates the Fourteenth Amendment's Equal Protection Clause by favoring long-term California residents over newcomers.

Section 11450.03 was adopted in 1992, a time of continuing and severe economic and fiscal problems in California. Its stated goal was to reduce the state's staggering welfare expenditures.[3] In October 1992, the Secretary of Health and Human Services (HHS) issued a waiver, signifying its approval of § 11450.03. A federal district court preliminarily enjoined California officials from enforcing

[3] Respondents do not contest that California's annual public assistance benefits are mammoth. For example, in Fiscal Year 1995-96, California provided $6 billion in assistance under the Aid to Families with Dependent Children ("AFDC") program alone. Although it has only 12 percent of the nation's population, California accounts for 29% of all money spent nationwide on the AFDC program; and its monthly average caseload of 2,645,814 persons is 20% of the national AFDC caseload.

the new law (*Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993)), and the Ninth Circuit affirmed. *Green v. Anderson*, 26 F.3d 95 (9th Cir. 1994). This Court granted certiorari and agreed to review the propriety of the injunction. Before the Court ruled, the Ninth Circuit (in connection with unrelated litigation) vacated the waiver that HHS had granted for § 11450.03; in the absence of the waiver, California lacked authority to implement its law. Consequently, the Court held that the case was not ripe for review; it vacated the decisions of the Ninth Circuit and the district court and ordered that the case be dismissed. *Anderson v. Green*, 513 U.S. 557 (1995).

The matter was revived following Congress's adoption of welfare reform legislation in 1996. The reform law (known as the Personal Responsibility and Work Reconciliation Act of 1996, or "PRWORA") explicitly authorized relocation grant provisions of the type contained in § 11450.03.[4] Pursuant to PRWORA, California obtained federal certification for its TANF plan and thereby became

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[4] PRWORA is codified at 42 U.S.C. §§ 601, *et seq*. The relevant provision of PRWORA, 42 U.S.C. § 604(c), provides:

> **Authority to treat interstate immigrants under rules of former State.** A State operating a program funded under this part [42 U.S.C. §§ 601 et seq.] may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months.

PRWORA gave a new name to the former AFDC program: Temporary Assistance to Needy Families ("TANF"). Pursuant to PRWORA, the federal government provides block-grant funding to states with certified TANF plans.

authorized once again to implement § 11450.03. The district court, however, issued a preliminary injunction on June 4, 1997 against implementation of § 11450.03. Petition Appendix ("Pet. App.") 13-31.

In its opinion, the district court stated that the applicable law had remained unchanged following its 1993 opinion, and it thus re-adopted the earlier opinion. Pet. App. 26-27. The court determined that the distinction drawn by § 11450.03 between new and long-time residents of California was subject to strict scrutiny under the Equal Protection Clause. *Id.* at 27; *Green v. Anderson*, 811 F. Supp. at 521. The court said that § 11450.03 cannot withstand equal protection challenge in the absence of evidence that the law "furthers a compelling state purpose," because § 11450.03 "places a penalty on migration" (*id.*), and because "freedom of travel or migration" is a "constitutional right" that "'occupies a position fundamental to the concept of our Federal union.'" *Id.* at 518 (quoting *United States v. Guest*, 383 U.S. 745, 757-58 (1966)).

The court went on to find that California had failed to meet its heavy evidentiary burden. Pet. App. 21-30. The court rejected California's contention that the proper comparison for equal protection purposes was between Respondents and comparably-situated welfare recipients in the states from which they had come; rather, the district court held, the proper comparison was between Respondents and comparably situated welfare recipients among long-term California residents. *Id.* at 28-30. Section 11450.03 could not withstand strict equal protection scrutiny, the court held, because California had failed to justify its disparate treatment of those two groups. *Id.*

The Ninth Circuit affirmed. Pet. App. 1-12. The appeals court agreed with the district court that, for purposes of equal protection analysis, "the appropriate comparison is between the treatment of recent residents of California and other residents of California and not a comparison of recent residents of California to residents of other states." *Id.* at 11. The appeals court determined that Respondents had "demonstrated a probability of success on the merits," based upon "the persuasive authority of our prior affirmance in *Green v. Anderson* and the apparent purpose of § 11450.03" -- which the appeals court determined to be a desire to exclude from California people "with a mindset of economic dependency." *Id.* at 10.

SUMMARY OF ARGUMENT

The California statute at issue in this case, § 11450.03, was enacted in 1992 during a period of fiscal crisis in the State. The statute is an effort to reduce welfare expenditures; in adopting the statute, California determined that the impact of the reductions should fall more heavily on newcomers than on established residents, who may be less able to adjust to benefit reductions. Numerous other States (including, among others, Illinois, Iowa, Minnesota, New York, New Jersey, Pennsylvania, Rhode Island, Washington, Wisconsin, and Wyoming) have made that same determination, with the explicit blessing of Congress (as evidenced by PRWORA).

The decision below treated § 11450.03 as if it were identical to the residency requirements considered in *Shapiro v. Thompson,* 394 U.S. 618 (1969), in which this Court applied heightened equal protection review to -- and ultimately struck down -- State laws that prevented newcomers from receiving welfare benefits for the first 12

months of residence in the State. But unlike the situation in *Shapiro,* in which this Court applied strict scrutiny on the basis that the programs amounted to a "penalty" on the right to interstate travel, California's denial of an *increase* in a newcomer's former benefit level is hardly a "penalty" on the newcomer's travel in any conventional sense.

Under the properly applicable standard of rational basis review, California's program is justified as a means of reducing welfare expenditures while allocating the reductions so that they fall in greater proportion on those who are relatively better able to absorb them. In comparison with established residents, who may have longstanding ties to a particular area, newcomers who are welfare recipients can more easily adjust to cuts through such decisions as their choice of communities.

Further, even if the Constitution is held to require enhanced scrutiny of residency-based programs that States have established on their own authority, rational basis review should still apply when, as here, the State program has been explicitly authorized by congressional statute.

ARGUMENT

I. SECTION 11450.03 SHOULD BE SUBJECTED TO RATIONAL BASIS REVIEW IN THE ABSENCE OF EVIDENCE THAT IT IMPINGES UPON THE EXERCISE OF THE RIGHT TO INTERSTATE TRAVEL

A legislative classification normally will be found to deny equal protection only if it is not "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Only in

exceptional circumstances is it appropriate for courts to impose a heightened standard of review in cases raising equal protection claims.

The district court found that this was the rare case in which heightened review was appropriate because, it held, § 11450.03 imposes a "penalty" on the right to travel. The court said, "Because § 11450.03 places a penalty on migration, the defendants must show that the statute furthers a compelling state purpose." *Green v. Anderson*, 811 F. Supp. at 521.[5] The Ninth Circuit affirmed, based on the "persuasive authority of our prior affirmance in *Green v. Anderson*," a decision in which the appeals court had adopted the district court's reasoning. Pet. App. 10; *Green v. Anderson*, 26 F.3d 95 (9th Cir. 1994), *vacated as moot*, 513 U.S. 557 (1995). The decision to subject § 11450.03 to heightened equal protection scrutiny conflicts with numerous decisions of this Court.

A. Section 11450.03 Cannot Be Said to "Penalize" Respondents' Travel When They Are No Worse Off Than If They Had Never Moved

The Court has applied heightened scrutiny in two cases in which state statutes challenged under the Equal Protection Clause were said to impose a penalty on interstate

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[5] The district court's June 4, 1997 opinion (Pet. App. 13-31) did not specify what level of equal protection review it was applying in striking down § 11450.03. However, the opinion stated explicitly that the court was adopting the "right of migration" analysis contained in its 1993 *Green v. Anderson* opinion (Pet. App. 27), and (as noted above) that earlier opinion had subjected § 11450.03 to heightened review. One thus can safely conclude that the district court was employing heightened equal protection review in its June 4, 1997 opinion.

travel. In *Shapiro*, the Court applied strict equal protection scrutiny to State laws that prevented newcomers from receiving *any* assistance under the AFDC program for the first 12 months of residence. The Court held that the right to interstate travel is recognized by the Constitution as a "fundamental" right upon which states may not impose any "unreasonabl[e] burden." *Shapiro*, 394 U.S. at 629-30. The Court said that any classification that serves to "penalize" the exercise of the right to travel violates equal protection "unless shown to be necessary to promote a *compelling* government interest." *Id.* at 634 (emphasis in original). The Court said that the challenged laws imposed just such a penalty: such laws deprive migrating indigents of *any* AFDC benefits for a 12-month period following departure from their former states of residence.

The Court applied strict scrutiny in a second "right to travel" case several years later: *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). *Memorial Hospital* challenged an Arizona law requiring a year's residence as a condition to an indigent's receiving nonemergency medical care at county expense. The Court applied its "compelling state interest" standard after determining that the law "penalized" the right to interstate travel. *Id.* at 257-62. Nonetheless, the Court emphasized that some incidental burdens on interstate travel are not sufficiently onerous to trigger strict scrutiny:

> Although any durational requirement impinges to some extent on the right to travel, the Court in *Shapiro* did not declare such requirements to be *per se* unconstitutional. The Court's holding was conditioned . . . by the caveat that some "waiting-period or residence requirements . . . may not be penalties upon the exercise of the constitutional right to interstate travel."

> The amount of impact required to give rise to the compelling-state-interest test was not made clear.

Id. at 256-57 (quoting *Shapiro*, 394 U.S. at 638 n.21). *Memorial Hospital* thus stands for the eminently sensible proposition that laws imposing only minor burdens on the right to interstate travel are not to be subjected to strict scrutiny under the Equal Protection Clause. In the absence of such a rule, commonplace financial exactions (such as tolls collected at interstate bridges or taxes on interstate airline flights) would be rendered suspect.

The courts below found California's residency-based benefit levels constituted a "penalty" on the exercise of the right to travel because they treat newcomers to California differently from other California residents. *Green v. Anderson*, 811 F. Supp. at 521; Pet. App. 28-29; *id.* at 9-10. Hence the courts held that heightened equal protection scrutiny must be applied to California's classification of its residents.

Because § 11450.03 generally provides new residents the same AFDC benefits that they were eligible to receive before moving to California, however, the statute can hardly be said to "penalize" interstate migration in any normal sense of the word. Nor does the statute deny newcomers the exercise of a fundamental right, such as the right to vote. *See Dunn v. Blumstein*, 405 U.S. 330 (1972). The rational basis standard should therefore govern in this case.

The district court characterized the California program as denying "the necessities of life" in part on the basis that it "makes no accommodation for the different costs of living that exist in different states." *Green v. Anderson*,

811 F. Supp. at 521. But that is a feature of the federal welfare program itself, which permits a State to set its benefit levels at an amount less than the standard of need it has calculated. Under the AFDC program, states were free to "pare down payments to accommodate budget realties by reducing the percentage of benefits paid or switching to a percentage reduction system." *Rosado v. Wyman*, 397 U.S. 397, 413 (1970). PRWORA grants even greater flexibility to states; they are authorized to use federal block grants "in any manner that is reasonably calculated to accomplish the purpose" of the TANF program. 42 U.S.C. § 604(a)(1).

Thus, even a state with no residency-based benefit levels may "penalize" a newcomer or deny "necessities of life" in the sense of failing to set benefits at a level commensurate with the costs of living in his or her new state. But neither the Supreme Court nor this Court has ever indicated that such a failure implicates the right to travel or any other constitutional right.

When a State statute results in newcomers being afforded fewer benefits than established residents, *Shapiro* mandates that the statute be subjected to strict scrutiny *only* when the statute deters or penalizes migration. Where, as here, migration is not being penalized, the Court routinely has subjected such challenged statutes to regular, rational-basis equal protection analysis.

B. *Zobel, Hooper,* and *Soto-Lopez* Were Not "Right-to-Travel" Cases and Did Not Invoke Heightened Scrutiny

In an effort to bolster their contention that § 11450.03 imposes a penalty on interstate travel (and thus is subject

to heightened scrutiny), the courts below cited to three Supreme Court equal protection decisions involving challenges to laws that classified state residents based on length of residence. Pet. App. 11, 27-30. The courts below simply misinterpreted these decisions; none of the three implicated the right to interstate travel, and in none did the Court apply heightened equal protection scrutiny.

Zobel v. Williams, 457 U.S. 55 (1982), involved an Alaska statute that provided annual cash payments to all adult residents based on years of residence; those who had lived in Alaska for one year would receive one dividend unit, those who had lived in Alaska for 21 years would receive 21 dividend units, etc. The Court held that the cash distribution scheme violated equal protection because Alaska had "shown no valid state interests which are rationally served" by the scheme's creation of numerous, permanent classes of residents. *Zobel*, 457 U.S. at 65. The Court never suggested that the Alaska payment scheme imposed a penalty on interstate travel[6] and did not hold that the scheme was subject to heightened scrutiny.

Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985), involved a New Mexico statute that provided a partial property tax exemption to Vietnam War veterans, but limited the exemption to veterans who were New Mexico residents prior to 1976. Relying on its opinion in *Zobel*, the Court held that the different treatment afforded New Mexico war veterans based on the date they first became New Mexico residents violated equal protection

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[6] Indeed, such a finding would have been untenable, since the Alaska payment scheme could only serve to encourage migration from other states, which lacked similar payment schemes.

because it did not "rationally further[]" any "legitimate state purpose." *Hooper*, 472 U.S. at 618-623. Because the Court found that the statute did not pass "even the minimum rationality test," the Court had no occasion to consider whether the statute penalized interstate travel or should be subjected to heightened scrutiny. *Id.* at 618.

Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986), involved a New York law that provided a civil service preference to New York veterans, but only if they were New York residents at the time they first entered military service. A splintered Court struck down the law on equal protection grounds, but no opinion commanded a majority. Nor could the Court agree regarding whether heightened equal protection review was appropriate. Four justices (the three dissenters plus Justice White) said that rational basis review should apply because the law did not implicate the right to travel. *Soto-Lopez*, 476 U.S. at 916 (White, J., concurring in the judgment); *id.* at 922 (O'Connor, J., dissenting). Four justices said that heightened equal protection review was required because the statute "operates to penalize appellees for exercising their rights to migrate." *Id.* at 909 (plurality opinion). The ninth justice, Chief Justice Burger, said that the statute flunked the rational basis test and thus there was no reason to decide whether heightened scrutiny applied. *Id.* at 912-16 (Burger, C.J., concurring in the judgment).

Accordingly, nothing in *Zobel*, *Hooper*, or *Soto-Lopez* supports the lower courts' holding that § 11450.03, by differentiating among residents based on length of residency, implicates the right to interstate travel and thus is appropriately subject to heightened equal protection scrutiny.

Indeed, even the *Soto-Lopez* plurality -- in finding that a law differentiating among residents based on length of residency imposes a penalty on interstate travel -- relied principally on a factor not present in the instant case: the New York statute effected a "*permanent* deprivation of a significant benefit, based only on the fact of nonresidence at a past point in time." *Soto-Lopez*, 476 U.S. at 909 (plurality opinion) (emphasis added). There is no such permanent deprivation in the instant case; § 11450.03 provides for full benefits for new arrivals after they have resided in California for 12 months. There is simply no case-law support for the district court's contention that a law that ensures that those who migrate to California will not suffer a decrease in welfare benefits nonetheless somehow penalizes interstate travel.

Moreover, the district court's own factual findings undercut its legal conclusion that § 11450.03 penalizes interstate travel. After reviewing evidence submitted by Respondents, the court concluded that California's higher-than-average AFDC benefits do *not* act as a "welfare magnet"; i.e., do not induce indigent Americans to move to California in search of higher benefits. If that factual finding is correct, then the converse must also be true: § 11450.03's cap on benefits to new arrivals would not discourage travel by indigents who seek to move to California.

C. California Has No Obligation To Subsidize Respondents' Exercise of Their Right to Travel

As noted above, *Memorial Hospital* makes clear that laws imposing minor burdens on interstate travel (e.g., interstate bridge tolls, taxes on interstate airplane tickets) do not constitute a "penalty" such that heightened equal

protection review is warranted. If minor burdens on interstate travel do not warrant heightened review, then surely a State's decision not to confer a benefit on migrants (such as a decision not to provide welfare benefits at a level higher than the migrants were eligible to receive in their former state) does not warrant heightened review.

The Court has repeatedly held that government has no obligation to subsidize the exercise of even fundamental rights. Thus, in *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983), the Court rejected a nonprofit organization's claims of free speech/equal protection rights to receive tax deductible contributions to support its lobbying activity. The Court explained that the "decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Id.* at 549. Here, California has not "regulated" the right to travel, but has, at most, "simply chosen not to pay" the costs associated with its exercise. *Id.*

Like the classification in the Food Stamp Act upheld by the Court in *Lyng v. UAW*, 485 U.S. 360 (1988), which denied food stamps to households of striking workers, California's classification "does not 'order or prevent'" anyone from migrating to the state. *Id.* at 365 (citation omitted). The Court noted in *Lyng*, "Strikers and their union would be much better off if food stamps were available, but the strikers' right of association does not require the Government to furnish funds to maximize the exercise of that right." *Id.* at 368. *See also Harris v. McRae*, 448 U.S. 297, 321-26 (1980) (Medicaid funding need not be provided for women seeking medically necessary abortions).

In short, the Constitution "generally confer[s] no affirmative right to governmental aid, even where such aid

may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 196 (1989). California may not, of course, employ irrational classifications as the basis for withholding governmental aid; but surely a decision not to *increase* aid above what an indigent individual has previously received (thereby declining to subsidize the indigent's travel) does not provide justification for courts to employ heightened equal protection scrutiny.

D. The Relevant Comparison for Purposes of Determining Whether Respondents' Right to Travel Has Been Penalized Is Between Respondents and Comparably-Situated Welfare Recipients in the States from Which They Came

In support of its contention that § 11450.03 penalizes the right to interstate travel, the appeals court asserted that the relevant comparison for determining the existence of a penalty is between Respondents and comparably-situated welfare recipients among long-term California residents, not between Respondents and comparably-situated welfare recipients in the states from which they had come. Pet. App. 11. In making that assertion, the appeals court has misconstrued *Zobel, Hooper*, and *Soto-Lopez*.

The court of appeals erred in labeling those three cases as "right to travel" cases. As noted above, those three cases involved classifications of residents of a State based on duration of residency. In none of the cases did the Court apply a "right to travel" analysis or find that heightened scrutiny was warranted. Although the Court's equal protection analysis in those cases involved comparing newcomers to long-term residents of the same State, the

Court did so solely for the purpose of determining whether the State had a rational basis for treating those two groups differently. It never suggested that a comparison between those two groups was relevant to determining whether the schemes penalized interstate travel.

The two cases in which the Court has found that public assistance statutes penalized exercise of the right to travel -- *Shapiro* and *Memorial Hospital* -- involved plaintiffs who were demonstrably worse off after moving to new States. In both instances, plaintiffs were eligible for public assistance in their prior States but were barred from receiving assistance for 12 months in their new States. Thus, the Court apparently determined that strict equal protection scrutiny was appropriate in these two cases based on a comparison between the plaintiffs and similarly situated welfare recipients *in the States from which they had come;* only by making such a comparison could the Court determine that the challenged statutes deterred or penalized migration.

The Ninth Circuit employed a similar analysis in a case raising a right-to-travel claim. *Fisher v. Reiser*, 610 F.2d 629 (9th Cir. 1979), involved a Nevada statute that provided a cost-of-living increase to workers' compensation beneficiaries who had been injured at work in Nevada and still lived in the state, but denied a cost-of-living increase to similarly-situated beneficiaries who had moved out of Nevada. In determining whether the statute effected a burden on interstate travel, the court declined to focus on a comparison between beneficiaries who had remained in Nevada and those (such as the plaintiff) who had exercised

their right to leave the state.[7] Rather, the court focused on a comparison between the plaintiff and others similarly situated to the plaintiff (i.e., other beneficiaries who were no longer residents of Nevada). *Fisher*, 610 F.2d at 633-35 (Kennedy, J.). Since Nevada did not provide cost-of-living increases to other non-resident beneficiaries who had not exercised the same interstate travel rights as had the plaintiff, the Court held that Nevada had not penalized the plaintiff based on her interstate travel when it denied her a cost-of-living increase, and thus declined to apply heightened equal protection scrutiny. *Id.*

In sum, the courts below erred in applying heightened equal protection scrutiny to § 11450.03. The courts should have confined themselves to a determination of whether the California law rationally serves a legitimate state interest.

II. § 11450.03 IS JUSTIFIED BY THE DIFFERING RELIANCE INTERESTS OF LONGTIME RESIDENTS AND NEWCOMERS

The residency-based benefit levels adopted by California easily pass rational basis review. "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the

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[7] Of course, had the court made such a comparison, it would have been forced to conclude that the Nevada statute severely disadvantaged those beneficiaries opting to leave the state and thus that the statute should be subject to heightened equal protection scrutiny.

classification." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

Residency-based cuts in welfare have such a basis: they allocate cuts in benefits so that the cuts fall in greater proportion on those who can best shoulder them. In comparison with established residents of the state, who are more likely to have longstanding ties to a particular area, newcomers who are welfare recipients can more easily adjust to cuts through their choice of communities and lifestyles. Petitioners never had the opportunity to make such a showing, however, because the lower courts erroneously applied strict scrutiny.

California has been suffering under a long-standing budgetary crisis. In 1992, the year that § 11450.03 was enacted, the state was in such straights that it was forced to pay its employees with I.O.U.'s known as "registered warrants," which some banks refused to accept. *See* Michael Meyer, "California Broke, But Who Will Fix It?," Newsweek, Aug. 17, 1992, at 37.

The residency-based welfare benefit levels were expected to make a modest, but useful, contribution to the state's budgetary outlook. The record indicates that the district court's suspension of the implementation of § 11450.03 was expected to result in $10.9 million in additional state expenditures in Fiscal Year 1997-98 alone.

When the case was initially before the district court in 1993, the court found, without analysis, that new residents are "no better able to bear the loss of benefits than a group randomly drawn." *Green v. Anderson*, 811 F. Supp. at 523. This conclusion has no apparent basis in the record (either in 1993 or in 1997) and was not repeated in connec-

tion with the court's latest injunctive order. To the extent that the record is deficient in this regard, the fault lies with Respondents, because "those attacking the rationality of the legislative classification have the burden 'to negate every conceivable basis which might support it.'" *Beach Communications*, 508 U.S. at 315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).[8]

The district court suggested that California could effect its desired savings by reducing AFDC benefits to a slight degree across the board. Pet. App. 31. While California could have proceeded in that fashion, it chose instead to allocate its cost savings in a different manner -- such that a group that had come to expect benefits at a particular level would not be disappointed. As the Supreme Court has warned, "[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

While recipients of public benefits do not, of course, have a constitutional right to continued receipt of their benefits at accustomed levels, a state's desire to respect expectation and reliance interests has been recognized by the Court as a legitimate objective, although it necessarily

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[8] If *amici* are correct that new residents are better able to bear the loss of welfare benefits than are long-term residents, then it does not matter whether California has pressed that rationale in support of § 11450.03. "The Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992).

discriminates against the interests of newcomers. *See, e.g., Nordlinger v. Hahn*, 505 U.S. 1 (1992); *Heckler v. Mathews*, 465 U.S. 728, 746 (1984); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 178 (1980); *New Orleans v. Dukes*, 427 U.S. 297, 305 (1976).

In *Nordlinger*, the Court considered an equal protection challenge to a California provision that restricted increases in the assessed valuation of real property to 2% each year. *Nordlinger*, 505 U.S. at 5. Property sales triggered new assessments at market value. *Id.* Because real estate prices were escalating, the scheme forced newcomers to pay considerably higher real estate taxes than longtime owners. *Id.*

The Court, applying the rational basis standard of review, cited two grounds sufficient to uphold the classification: (1) an interest "in local neighborhood preservation, continuity, and stability"; and (2) the fact that "a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner." *Id.* at 12. Here, as in *Nordlinger*, the State may have thought established residents hold greater "vested expectations" in their level of benefits and in the lifestyle, however modest, they have been able to finance with those benefits for their children. Also, a prospective new resident "has full information" about the reduced benefits when he moves into the state, and can consider them in deciding where to move. *Id.* These legitimate, non-invidious reasons for the distinction

are sufficient to justify it under a rational basis standard.[9]

It is true that the Court struck down durational residency requirements on equal protection grounds in *Zobel, Hooper,* and *Soto-Lopez*. However, the Court did so not out of any distaste for durational residency requirements, but rather because the defendants in those cases failed to articulate any legitimate, rational basis for the distinctions they drew between old and new residents. The Court made particularly clear in *Hooper* that it will not accept as a rational basis for such distinctions a State's desire to preserve its resources for "its own" residents -- since new residents are just as much a part of the State's "own" residents as are long-term residents. *Hooper*, 472 U.S. at 623. But nothing in *Zobel, Hooper*, or *Soto-Lopez* indicates that the Court would have been unwilling to uphold the disputed durational residency requirements if the States had articulated rational bases for them. Since a rational basis exists for § 11450.03, it should be upheld.

III. THE VALIDITY OF CALIFORNIA'S PROGRAM IS FURTHER SUPPORTED BY CONGRESSIONAL AUTHORIZATION

The courts below overturned not only the judgment of the California legislature but also that of Congress, which expressly authorized such programs when it adopted 42 U.S.C. § 604(c) as part of PRWORA; and that of HHS, which certified the California TANF plan that included the provisions for reduced benefits for newcomers.

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[9] *See also Shapiro,* 394 U.S. at 672-74 (Harlan, J., dissenting) (outlining four legitimate purposes served by State welfare residency requirements).

Hence, even if California's plan is held to be a "penalty" upon travel by indigents, the question is not the standard of review to be applied when a State establishes such a program on its own, but the standard of review to be applied when a State establishes such a program with congressional authorization. The existence of congressional approval provides an independent reason for employing a deferential "rational basis" review.

In *Shapiro*, the Court found that the Social Security Act contained no congressional approval for durational residency requirements that banned all welfare benefits during the first year of residency. *Shapiro*, 394 U.S. at 639-40. The Court further indicated in *dictum* that, in any event, a State law that violated the Equal Protection Clause would not escape judicial review by virtue of congressional endorsement: "Congress may not authorize States to violate the Equal Protection Clause. . . . Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause." *Id.* at 641.

But that *dictum* is based on the assumption that the State program in question has already been determined to violate the Equal Protection Clause. It does not speak to the issue presented here: what effect does congressional approval have, if any, on the standard of review to be applied in determining whether § 11450.03 does, in fact, violate the Equal Protection Clause? Given the substantial deference owed by the courts to Congress when the latter is exercising its delegated powers, Congress's approval of § 14450.03 should weigh heavily in determining the proper standard of review. As the Court stated in *Lyng*, "[O]ur review of distinctions that Congress draws in order to make allocations from a finite pool of resources must be

deferential, for the discretion about how best to spend money to improve the general welfare is lodged in Congress rather than the Courts." *Lyng*, 485 U.S. at 373.

Moreover, while Congress is clearly subject to equal protection restraints, it is less clearly bound by the restraints imposed by virtue of the constitutional right to travel (the asserted basis for the lower courts' resort to heightened equal protection scrutiny of § 11450.03). The Court has never identified a precise textual source for the right to travel; and at least three of the constitutional provisions suggested as bases for that right -- the Privileges and Immunities Clauses of Art. IV, § 2 and of the Fourteenth Amendment; and the Commerce Clause -- are inapplicable to Congress and can be overridden by Congress in their application to the States.

Amici respectfully submit that at least where, as here, the contested provision of State law places only a burden upon interstate travel -- if it does that much -- and does not regulate anyone's travel into the state, the appropriate analytical framework is that developed by the Supreme Court in deciding claims based on the "dormant" Commerce Clause. "When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp, Inc. v. Bd. of Governors of the Federal Reserve System,* 472 U.S. 159, 174 (1985). Federal regulations adopted pursuant to congressional authority can also authorize state actions that would otherwise violate the Commerce Clause. *See White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 213-15 (1983). Congress adopted PRWORA pursuant to its Commerce Clause powers; *amici* submit that the Commerce Clause provides ample authority for Congress to authorize

the durational residency requirements so clearly authorized by 42 U.S.C. § 604(c).

The Court has repeatedly recognized the appropriateness of judicial deference to congressional authority even when core constitutional rights are at stake. For example, in *Plyler v. Doe,* 457 U.S. 202 (1982), even while asserting the equal protection rights of undocumented aliens children to attend local public schools, the Court recognized that Congress -- in the exercise of its constitutional authority over immigration matters -- could establish a national policy barring undocumented aliens from the schools. *Plyler,* 457 U.S. at 224, 226. Similarly, in *City of Boerne v. Flores,* 117 S. Ct. 2157 (1997), while asserting ultimate judicial authority to determine the meaning of the Fourteenth Amendment, the Court acknowledged that "Congress must have wide latitude" in carrying out measures that Congress believes are necessary for enforcing the Fourteenth Amendment. *City of Boerne,* 117 S. Ct. at 2164.

Welfare residency requirements were enforced by 46 States before being prohibited in 1970 by *Shapiro. See Shapiro,* 394 U.S. at 676 n.36 (Harlan, J., dissenting). State-funded welfare benefits have been falling ever since. When considered in 1993 dollars, the average monthly State AFDC benefit "rose steadily from $344 in 1940 to $676 in 1970, only to start a rapid and continuing decline to $373 in 1993." T. Zubler, *The Right to Migrate and Welfare Reform: Time for Shapiro v. Thompson to Take a Hike,* 31 VAL. L. REV. 893, 926 (1997). Congress may well have determined that States' decreased generosity to the indigent was attributable, at least in part, to their reluctance to offer benefits that might attract indigents from other States. In adopting PRWORA, Congress could

rationally have decided to overcome that reluctance by permitting States offering generous benefits to take steps designed to ensure that they did not thereby become "welfare magnets." *See id.* at 933-938.

The Court should be reluctant to second-guess Congress's determination, made pursuant to its Commerce Clause powers, that the interests of the national economy would be best served by permitting States to adopt legislation of the type at issue here. In light of that determination, *amici* submit that the Court's review of § 14450.03 should be highly deferential.

CONCLUSION

Amici curiae Washington Legal Foundation, *et al.*, respectfully request that the Court reverse the judgment of the court below.

Respectfully submitted,

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No. 98-97

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ELOISE ANDERSON, Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; and CRAIG L. BROWN, Director, California Department of Finance,

Petitioners,

v.

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY-COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether California's rule limiting new residents to the TANF benefit level of their prior state of residence for one year is constitutional.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials

throughout the United States.[1] *Amici* have a compelling interest in the issue presented in this case: whether California's rule limiting new residents to the TANF benefit level of their prior state of residence for twelve months is constitutional.

In response to the universally acknowledged failure of the Washington-centered AFDC program, Congress, in consultation with the States, undertook a revolutionary restructuring of the welfare system by enacting the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). PRWORA purposely devolves power from the Federal Government to the States. Its success is predicated upon the ability of the States to engage in a large degree of innovation in their welfare programs, which virtually all States have already done.

In addition, a key feature of PRWORA is its express authorization to States to "apply to a family the rules (including benefit amounts) of the program . . . of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months." 42 U.S.C. § 604(c). Pursuant to this authorization, California and thirteen other States have thus far adopted durational residency rules governing benefit levels. Both Congress and the legislatures of those fourteen

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

States have concluded that such residency rules are necessary not only to protect States with higher benefit levels from attracting recipients from other States solely in order to receive higher benefits, but also to prevent States with more generous programs from being forced to reduce benefits and other programs because of limited state resources and capped federal funding under PRWORA's block grant formula.

Because of the importance of the issue presented to the ability of the States to devise and implement successful welfare programs, *amici* submit this brief to assist the Court in the resolution of this case.

STATEMENT

By 1996, a consensus had emerged that the Nation's "Washington-centered welfare regime" was a failure. *See, e.g.*, H.R. Rep. No. 651, 104th Cong., 2d Sess. 3-5 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2184-2186. The welfare system was viewed as "trap[ping] recipients in a cycle of dependency," "undermin[ing] the values of work and family that form the foundation of America's communities," and "fail[ing] the Nation's children." *Id.* at 3, 1996 U.S.C.C.A.N. at 2184. While all levels of government increased welfare spending "from $24.4 billion in 1960 to an estimated $397.1 billion in 1995," the poverty rate "held stubbornly at between 12 and 15 percent of the population" and "enrollment in Aid to Families With Dependent Children [AFDC], the principal welfare program, ha[d] increased fivefold." *Id.* at 3-4, 1996 U.S.C.C.A.N. at 2184-85. Moreover, by 1996, "illegitimacy ha[d] increased 400 percent, the number of single-parent families ha[d] increased 238 percent, and violent crime ha[d] risen 560 per-

cent." *Id.* at 4, 1996 U.S.C.C.A.N. at 2185. Research conducted for the Urban Institute showed that "90 percent of those currently receiving welfare will eventually spend more than 2 years on the rolls, and 76 percent will receive welfare for more than 5 years." *Id.*

The "greatest tragedy of the welfare system" was "how it harm[ed] the Nation's children," increasing illegitimacy and "breed[ing] a variety of . . . pathologies scarring children in ways that can affect their entire lives." *Id.* According to the National Health Interview Survey of Child Health, "children born out of wedlock have more emotional and behavioral problems than children in intact families." *Id.* Research done for the Department of Health and Human Services indicated "that children born out of wedlock are three times more likely to become dependent on welfare than are other children." H.R. Rep. No. 651 at 5, 1996 U.S.C.C.A.N. at 2186. A University of Michigan study found that "the receipt of welfare income has negative effects on young boys with respect to their long-term employment and earnings capacity." *Id.*

A. The Personal Responsibility And Work Opportunity Reconciliation Act Of 1996

In response to the failure of "the Washington-centered welfare regime," *id.*, Congress, in consultation with the States, undertook a revolutionary restructuring of the welfare system by enacting the Personal Responsibility And Work Opportunity Reconciliation Act Of 1996 (PRWORA), P.L. 104-193, 110 Stat. 2105. PRWORA significantly changed both the relationship between the States and Federal Government and that between welfare recipients and all levels of the government.

First, PRWORA marks a major devolution of power from the Federal Government to the States. The statute rejected the extant approach under which the States were required to seek waivers from the Department of Health and Human Services to implement welfare reform. *See* H.R. Rep. No. 651 at 3, 1996 U.S.C.C.A.N. at 2184 (characterizing it as "a system in which States must beg Washington for permission to innovate for the benefit of their populations"). Rather, PRWORA provides the States with block grants subject to reduced federal requirements. Congress took this approach, intending to grant the States "maximum . . . flexibility to show true compassion by helping those in need achieve the freedom of self-reliance," *id.*, and to "give[] States the freedom to innovate in developing income support programs for welfare families that encourage personal responsibility and move welfare recipients into the work force." H.R. Rep. No. 651 at 5, 1996 U.S.C.C.A.N. at 2186.

Second, PRWORA redefined the relationship between welfare recipients and the government in several critical ways. Under the statute, "welfare is, for the first time, converted to a work program." *Id.* PRWORA abolished the old AFDC program and its premise that welfare is an entitlement. *See* 42 U.S.C. § 601(b) (PRWORA "shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part"). This decision has substantial consequences for both recipients and the States. Congress replaced AFDC with a new program, Temporary Assistance to Needy Families

(TANF). With respect to recipients, PRWORA prohibits the use of federal TANF funds to provide welfare recipients with more than five years of lifetime benefits and "requires one member of every family on welfare to be working within 2 years." H.R. Rep. No. 651 at 5. 1996 U.S.C.C.A.N. at 2186. States, however, are free to use their own funds to provide welfare assistance to recipients beyond the federal time limit.

In response to the increase in the illegitimacy rate, PRWORA authorizes "States to cap benefits for those on welfare, ending bonuses for families on welfare who have additional children they cannot support." *Id.* Furthermore, PRWORA grants States the option of contracting out welfare services to such nongovernmental entities as "charitable, religious, or private organizations." PRWORA § 104(a), 110 Stat. 2161, codified at 42 U.S.C. § 604a(a). Under PRWORA, States are not required to provide cash assistance but can provide recipients with vouchers that are redeemable only by a contractor. *See id.*

PRWORA's abolition of welfare as entitlement also has substantial consequences for the States. While PRWORA's block grant approach provides the States with significant flexibility in designing their welfare programs, Congress did not write the States a blank check. Rather, a State's share of the federal block grant is capped at a fixed funding level through fiscal year 2002 under a complex formula. *See* PRWORA § 103, 110 Stat. 2116-24.[2] The statute also

[2] As the House Report explains, each State is to "receive the highest of Federal payments to the State for AFDC benefits, AFDC administration, Emergency Assistance, and JOBS

creates a $2 billion contingency fund accessible to States which experience, within a three month period, a ten percent increase in their unemployment rate over the average rate for the preceding two years, or a similarly large increase in their food stamp caseload. *See* PRWORA § 103(b)(6), 110 Stat. 2123. Monthly payments from the contingency fund to an individual State, however, are limited to one sixtieth of its Family Assistance Grant (which a State must match in additional spending) and the fund is to cover fiscal years 1997 through 2001. *See id.* § (b)(3), 110 Stat. 2122. It is thus entirely possible that a State can exhaust its federal block grant funds in the event of an economic downturn. By abolishing the entitlement to welfare and capping federal spending, PRWORA thus shifts to the States most of the financial risks associated with increased case loads.

B. State Welfare Reforms

Having been granted greater flexibility to design effective welfare programs, the States have adopted various reforms. These reforms demonstrate that PRWORA has fundamentally changed the Nation's welfare system from the AFDC program in existence at the time of *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Time Limits As of January 1998, thirty-five States had enacted lifetime benefit limits, most of which are set at 60 months. Jack Tweedie, *Building a Founda-*

for: (1) fiscal years 1992 through 1994, on average; (2) fiscal year 1994; or (3) fiscal year 1995; plus, under certain circumstances, 85 percent of increased fiscal year 1995 spending for emergency assistance." H.R. Rep. No. 651 at 1322, 1996 U.S.C.C.A.N. at 2381.

tion for Change in Welfare, State Legislatures, Jan. 1998, at 29 (hereinafter "*Building a Foundation*"). Six States have benefit limits shorter than five years and three other States have authorized their welfare agencies to set shorter limits. *Id.* Other States have enacted " 'periodic time limits' that end benefits after a certain period" (with some hardship exemptions) but allow recipients to "go back on the rolls after a certain period of time." *Id.* Some States apply their time limits only to the adult members of the family. *Id.* Most States have also enacted "conditional time limits," under which a recipient must meet certain conditions such as the performance of community service work or increase their cooperation with agency efforts to help them find a job in order to continue to receive benefits. *Id.* Among the States, there are substantial differences in exemption policy for the various categories of time limits. *See* L. Jerome Gallagher *et al.*, *One Year After Federal Welfare Reform: A Description of State Temporary Assistance for Needy Families (TANF) Decisions as of October 1997* 15-24 (The Urban Institute, 1998).

Work Participation Requirements Virtually every State now requires recipients to work to obtain benefits, although work participation requirements vary considerably. *See Building a Foundation* at 29. States have taken differing approaches as to whether a recipient's job search and educational activities satisfy work requirements. *See id.* at 31. Wyoming places recipients attending college in a separate state-funded program; New Jersey allows recipients to combine education and community service for their work activity. *Id.* Fifteen States require recipients to participate immediately in work activities, seven States require work after a short grace period, while

eighteen other States set 24 months as an outer limit, although seven of these States require participants to work as soon as they are ready. *Id.* at 29. In seven States, the date by which a recipient must participate in work activities to continue receiving benefits is set in an individualized employment plan. *Id.*

Sanctions States also impose a variety of sanctions for recipients who do not comply with work activity requirements. Sanctions differ from State to State with respect to the amount of benefit reduction and the length of the sanction. For example, with respect to the most severe sanctions, thirty-six States impose a full benefit reduction; fourteen States a partial reduction. The length of a sanction can vary from until the recipient complies, to various terms of months, to and including a recipient's lifetime. Each State which imposes a lifetime sanction also imposes a full benefit reduction. *See One Year After Federal Welfare Reform* at 29-31, 53-57.

Family Caps Twenty-two States deny increased benefits to families that have additional children while on welfare. *See Building a Foundation* at 31. Florida allows only half the increase for the first child born on welfare. *Id.* South Carolina denies increases in cash benefits but provides for additional benefits in the form of vouchers for the child's expenses or the mother's education or training expenses. *Id.*

Expanded Child Care Many States have substantially expanded the availability of child care programs. *Id.* These States have increased the availability of infant and sick child care as well as night and weekend care. *Id.* Some States have also expanded access to child care programs to the working

poor who earn in excess of the cutoff for cash assistance benefits. *Id.*

Increased Access To Transportation States recognize that a lack of transportation can prevent a person from holding a job and obtaining child care. *Id.* Louisiana now guarantees transportation where needed; Minnesota, South Carolina and Ohio exempt welfare recipients from work requirements and sanctions if transportation is unavailable. *Id.* Thirty-five States have also eased eligibility rules to allow recipients to own cars. *Id.* at 28. Virginia, Maryland, Florida, Texas and Tennessee make surplus government and donated cars available to recipients for purchase at low cost; some States provide recipients with cash for gas and repairs. *Id.* at 31.

Increased Income and Asset Eligibility Limits Thirty-five States have liberalized prior rules by allowing recipients to earn larger incomes before losing benefits. *Id.* at 28. For example, Connecticut and Indiana allow a family of three to earn up to the federal poverty line before losing benefits. *Id.* at 31. In Massachusetts and Nebraska, families subject to work requirements are allowed to keep 50 percent of their earnings. *Id.* Other States have increased the percentage of earnings which are disregarded in calculating benefits. *Id.* Thirty-six States have liberalized asset rules, allowing recipients to open individual development accounts where they can deposit funds for education, starting a business, or purchasing a home, while retaining eligibility for benefits. *See* Jack Tweedie *et al.*, *Meeting the Challenge of Welfare Reform: Programs with Promise* 5 (National Conference of State Legislatures 1998).

Diversion Programs Twenty-one States now offer lump sum payments to applicants who need help with emergency expenses (such as car repairs, back rent, utility bills) where it will help keep applicants off assistance. *See Building a Foundation* at 28. Generally, these programs provide a lump sum payment equal to three or four months of assistance; upon acceptance, the recipient loses welfare eligibility for a period. *See Meeting the Challenges of Welfare Reform* at 8. Some diversion programs also provide needy families with access to medical and child care and transportation assistance. *Id.*

Drug Law Offenders States are also in the process of developing different policies with respect to the eligibility of drug law offenders. *Id.* at 9-10. Arkansas, Florida, Georgia, Illinois and Rhode Island prohibit persons convicted of certain drug-related felonies from receiving any TANF benefits. *See* NCSL Web Site, State Welfare Reform Database.[3] Ten States currently require that drug felons participate in a treatment program to receive benefits; New Jersey and Minnesota require that drug felons submit to testing. *See id.*

As the foregoing indicates, the States have enacted a wide variety of welfare reform measures. Unlike the federally controlled system of largely uniform rules of the AFDC program in existence at the time of *Shapiro*, under which the principal difference between States was in benefit amounts and eligibility levels, there are now numerous and substantial differences between States in their approaches to dealing with recipients. Thus, unlike at the time of *Shapiro*,

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[3] The relevant NCSL web site is www.ncsl.org/statefed/welfare/welfaresearch.htm.

there are far more incentives for recipients to move to other States, whether to escape their home State's strict rules or to take advantage of another State's more favorable policies.

As Congress recognized, granting States the authority to enact durational residency rules, *see* 42 U.S.C. § 604(c), is an essential part of welfare reform to prevent shopping not only for higher benefit levels but also for more favorable program rules. *See* H.R. Conf. Rep. No. 725, 104th Cong., 2d Sess. 273 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2649, 2661; *see also* H.R. Rep. No. 651 at 1337, 1996 U.S.C.C.A.N. at 2396. Otherwise, States that have opted for higher benefit levels or more lenient program rules could be forced to abandon them. Including California, fourteen States have durational residency rules which provide that new residents receive TANF benefits at the level received in their prior State until one year has elapsed.[4] *See Building a Foundation* at 28, 33.

SUMMARY OF ARGUMENT

This Court has long recognized a "constitutional right to travel from one State to another," which "occupies a position fundamental to the concept of our Federal Union." *United States v. Guest*, 383 U.S. 745, 757 (1966). The Court has never held, however, that all laws affecting the right to travel are unconstitutional. Rather, the Constitution prohibits only those laws that penalize or unduly burden this right. If a classification does not penalize or unduly burden

[4] In addition to California, these States are: Connecticut, Georgia, Illinois, Iowa, Minnesota, New Hampshire, New York, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Washington, and Wisconsin. *See Building a Foundation* at 28.

the right to travel, it is subject to rational basis review.

A. California's durational residency rule limits a new resident's monthly cash assistance to the amount paid by the State of prior residence for a period of one year. At the same time, new residents are immediately eligible for a wide range of other forms of public assistance on the same terms as other California residents. While this Court has not defined the precise parameters of what constitutes an impermissible penalty on the exercise of the right to travel, its cases demonstrate that California's treatment of new residents seeking public assistance does not penalize the right to travel. That treatment is not "sufficiently analogous to a criminal fine to justify strict scrutiny." *Maher v. Roe*, 432 U.S. 464, 474 n.8 (1977).

In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Court invalidated several state laws denying new residents AFDC benefits until they had resided in their respective States for a period of one year. The state laws in *Shapiro* flatly denied certain new residents any AFDC cash assistance beyond temporary aid. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974), likewise involved a total denial of benefits.

Unlike the laws at issue in *Shapiro* and *Memorial Hospital*, California's rule does not impose a total denial of benefits on new residents. While the rule reduces an incentive to move, paying recipients the same level of benefits they received in their prior State does not deny them benefits they would have received had they not exercised their right to travel. When coupled with the fact that California makes numerous other benefits available to new residents

on the same terms as other California residents, its payment of the same level of TANF benefits as received in the prior State can in no sense be considered a penalty or analogous to a criminal fine.

B. Because California's rule does not penalize the right to travel, it is subject to rational basis review. The California law readily satisfies this level of constitutional scrutiny. It is rational to think that migration to avoid enforcement of program rules will jeopardize the success of welfare reform. It is also rational to think that States with greater benefit levels will become welfare magnets and will ultimately be forced to reduce benefits and programs because of limited state resources and capped federal funding under PRWORA's block grant formula. Because state residency rules like California's are rationally related to the prevention of these outcomes, and thus advance the national goal of welfare reform, they satisfy the Equal Protection Clause.

In *Shapiro* the Court stated that "the purpose of inhibiting migration by needy persons into the State is constitutionally impermisible." 394 U.S. at 629. *Shapiro* is not controlling here, however. First, Congress has expressly authorized state rules such as California's, *see* 42 U.S.C. § 604(c), and those persons likely to be affected by these rules were represented in the national political process. Second, there are numerous profound differences between the welfare system created by PRWORA and the AFDC program at issue in *Shapiro*.

Not least, Congress has broadly authorized "[a] State operating a program funded under this part [to] apply to a family the rules . . . of the program under this part of another State. . ." 42 U.S.C.

§ 604(c). As a result, States have adopted a variety of measures in reforming their welfare programs. Unlike under the AFDC program with its largely uniform rules, there are numerous incentives for recipients to migrate to other States to avoid enforcement of unfavorable rules. If the right to travel as articulated in *Shapiro* were found by this Court to prohibit a State from in any way treating new arrivals differently from longer term residents, welfare recipients could migrate to those States whose rules are more favorable to them and jeopardize benefit levels and programs there. Such an outcome would undermine the national interest in meaningful welfare reform, a goal which has been endorsed both by Congress and the States.

ARGUMENT

CALIFORNIA'S RULE LIMITING NEW RESIDENTS TO THE TANF BENEFIT LEVEL OF THEIR PRIOR STATE OF RESIDENCE FOR ONE YEAR DOES NOT PENALIZE THE RIGHT TO TRAVEL AND SATISFIES THE EQUAL PROTECTION CLAUSE

This Court has long recognized a "constitutional right to travel from one State to another," which "occupies a position fundamental to the concept of our Federal Union." *United States v. Guest*, 383 U.S. 745, 757 (1966). As Chief Justice Taney observed in *The Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849), "We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

The Court's cases have not adopted a *per se* rule that all laws affecting the right to travel are unconstitutional. *See Memorial Hosp. v. Maricopa County*,

415 U.S. 250, 256 (1974); *Shapiro v. Thompson*, 394 U.S. 618, 638 n. 21 (1969). As the Court explained in *Shapiro*, the scope of the right is that "all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which *unreasonably burden or restrict this movement*." 394 U.S. at 629 (emphasis added). Thus, where a classification "serves to penalize the exercise of [the] right," it is unconstitutional "unless shown to be necessary to promote a *compelling* governmental interest." *Id.* at 634. *See also Memorial Hospital*, 415 U.S. at 259.

The Court's cases, however, "have also established that only where a State's law ' "operates to *penalize* those persons . . . who have exercised their constitutional right of interstate migration" ' is heightened scrutiny triggered." *Attorney General Of New York v. Soto-Lopez*, 476 U.S. 898, 905 (1986) (emphasis added) (quoting *Memorial Hosp.*, 415 U.S. at 258 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 238 (1970) (opinion of Brennan, White, and Marshall, JJ.))). Where a classification does not penalize or impose an undue burden on the right to travel, it is subject to rational basis review.[5] *See, e.g., Sosna v.*

[5] The Court has taken a similar approach in reviewing equal protection challenges to classifications affecting other fundamental rights. For example, in *Maher v. Roe*, 432 U.S. 464 (1977), the Court characterized "the central question in [the] case [as] whether the regulation 'impinges upon a fundamental right explicitly or implicitly protected by the Constitution.' " *Id.* at 471 (quoting *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973)). The Court further explained that the right at issue was not "unqualified," but rather, "protects the woman from *unduly burdensome* interference with her freedom to decide whether to terminate her pregnancy." *Id.* at 473-74 (emphasis added). *See also Bellotti v. Baird*, 428 U.S. 132, 147 (1976) (state regulation "is not unconstitutional unless it unduly burdens the right to seek an abortion").

Iowa, 419 U.S. 393, 406 (1975) (rejecting right to travel challenge to durational residency requirement for divorce; "[a]ppellant was not irretrievably foreclosed from obtaining some part of what she sought, as was the case with the welfare recipients in *Shapiro* . . . or the indigent patient in *Maricopa County*"); *Vlandis v. Kline*, 412 U.S. 441, 452-53 n.9 (1973) (citing with approval *Starns v. Malkerson*, 401 U.S. 985 (1971) (affirming one year residency rule for in-state tuition at state university)). And if such a classification is rationally related to a legitimate state interest, it is constitutional.

A. California's Rule Does Not Penalize Or Unduly Burden The Right To Travel And Is Thus Subject To Rational Basis Review

California's durational residency rule limits a new resident's monthly cash assistance under TANF to the amount paid by the State of prior residence for a period of one year. *See* Cal. Wel. & Inst. Code § 11450.03(a). Under California law, however, new residents are eligible for all other forms of public assistance, including CALWORKS programs, on the same terms as other residents. These programs include Medicaid coverage; child care; education, job training, and job placement services; cash assistance under diversion programs; transportation assistance; and food stamps. Moreover, a new resident's food stamps are increased by approximately one dollar for every three dollars that the TANF cash grant is reduced by operation of Section 11450.03(a). California's rule, which is expressly authorized by federal

law, *see* 42 U.S.C. § 604(c), does not "penalize the exercise of [the] right" to travel. *Shapiro*, 394 U.S. at 634. Nor does it unduly burden the exercise of that right.

The Court has not defined "the ultimate parameters" of what constitutes a penalty on the exercise of the right to travel. *Memorial Hospital*, 415 U.S. at 259. The Court's cases demonstrate, however, that California's classification is not of the same kind as those classifications deemed to be penalties. *See id.* at 259-60; *Shapiro*, 394 U.S. at 627. *Cf. Edwards v. California*, 314 U.S. 160 (1941) (invalidating state law criminalizing act of bringing a non-resident indigent into a State). The State's rule is not "sufficiently analogous to a criminal fine to justify strict scrutiny." *Maher v. Roe*, 432 U.S. at 474 n.8.

In *Shapiro*, the Court invalidated several state laws denying new residents AFDC benefits until they had resided in their respective States for a period of one year. *See* 394 U.S. at 622-27. These provisions, however, flatly denied certain new residents any AFDC cash assistance beyond temporary aid. As the Court explained, under the state rules at issue "the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life." *Id.* at 627. As the Court subsequently explained, "[i]n *Shapiro*, the Court found denial of the basic 'necessities of life' to be a penalty." *Memorial Hospital*, 415 U.S. at 259.[6]

[6] Respondents contend that "the denial in *Shapiro* was not in all instances total" and "that two of the three states there, Connecticut and Pennsylvania, gave 'partial assistance.'" Opp. 17-18 (quoting 394 U.S. at 635). The "partial assistance" given by Connecticut was the same amount "which all Aid to Dependent Children applicants get up to sixty days." Brief State of Connecticut at 5, *Shapiro v. Thompson*, O.T. 1967, No. 9. The assistance was available only to those "mak-[ing] a bona fide effort to get a job." *Id.* at 4-5. The plaintiff "was unable to accept gainful employment," and denied "[a]ll public assistance" for six months. Brief of Appellee at 2-3, *Shapiro v. Thompson*.

Nor did Pennsylvania grant partial assistance in the manner that California does here. With the exception of persons who came from a State which had a reciprocal agreement with Pennsylvania, new arrivals were deemed residents of their former State and were entitled only to short term grants, the number of which depended upon whether the person had a plan of self-support. *See* Pa. Pub. Assistance Manual §§ 3151-3154.32 (*reprinted in* Appendix to Br. of Appellee at 1a-5a, *Reynolds v. Smith*, O.T. 1967, No. 34). The short term grants were "for seven days or less, as needed," *id.* § 3154.31, and in no case was a person eligible for more than four grants. *See id.* §§ 3154.11; 3154.12 (*reprinted in* Appendix Br. Appellee, *Reynolds*, at 3a-4a). Application of these regulations quickly resulted in the termination of all benefits to new arrivals. *See Shapiro*, 394 U.S. at 626. It is thus more accurate to describe the assistance provided by Connecticut and Pennsylvania as temporary rather than "partial."

Memorial Hospital is to the same effect. There, the Court invalidated a state law imposing a one year residency requirement for the receipt of nonemergency medical care at government expense. *See* 415 U.S. at 259-70. Reading *Shapiro* for the proposition that "denial of the basic 'necessities of life' [is] a penalty," the Court reasoned that "[w]hatever the ultimate parameters of the *Shapiro* penalty analysis, it is at least clear that medical care is as much 'a basic necessity of life' to an indigent as welfare assistance." 415 U.S. at 259.[7]

[7] In *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Court invalidated a state law imposing a one year residency require-

In *Memorial Hospital* the Court further explained that "[a]lthough any durational residence requirement imposes a potential cost on migration, . . . *Shapiro* cautioned that some 'waiting period[s] . . . may not be penalties.'" *Id.* at 258-59 (quoting 394 U.S. at 638 n.21). Indeed, in *Memorial Hospital*, the Court quoted with approval two lower court cases upholding durational residency rules for public universities, noting, *inter alia*, that such rules do not preclude a person "'from the benefit of obtaining higher education.'" 415 U.S. at 260 n.15 (citations omitted).

The following year, in *Sosna*, the Court upheld Iowa's durational residency rule for divorce, reasoning that "[a]ppellant was not irretrievably foreclosed from obtaining some part of what she sought, as was the case with the welfare recipients in *Shapiro*, the voters in *Dunn*, or the indigent patient in [*Memorial Hospital*]." *Sosna*, 419 U.S. at 406. The Court subsequently explained that its holdings in *Shapiro* and *Maricopa County* "recognized that denial of welfare to one who had recently exercised the right to travel across state lines was sufficiently analogous to a criminal fine to justify strict scrutiny." *Maher*, 432 U.S. at 474 n.8.

California's rule limiting, for one year, a workfare recipient's TANF cash benefit to the level received in a prior State is not "sufficiently analogous to a criminal fine" so as to constitute a penalty. *Id.* The rule does not impose a total denial of cash assistance as

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ment for voting. The Court subjected the provision to strict scrutiny, deeming it to be a classification which penalized persons exercising their right to travel. *See* 405 U.S. at 338-41. Of course, the statute imposed a total denial of the fundamental right to vote.

did the laws at issue in *Shapiro*. While the rule reduces an incentive to move, paying individuals the same level of benefits they received in their prior State does not deny recipients benefits they would have received had they not exercised their right to travel. In short, they are no worse off for having exercised their right to travel. And being paid the same level of benefits as received in a prior State can in no sense be considered "analogous to a criminal fine." *Id.*

That California has a higher cost of living than most States and pays substantially higher TANF benefits than some other States does not render the rule a penalty. *See* Opp. 4, 8-9 & n.5. California, after all, has no control over the legislative decisions which set the benefit levels of other States or the conditions which affect their costs of living. Indeed, if differences between various States' costs of living are constitutionally significant in penalty analysis, then the same might be said about a State's failure to adjust benefit levels to reflect the cost of living differences that frequently exist between urban and rural counties.[8]

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[8] Respondents assert that "the amount that newcomers receive would fall substantially short of what is required to subsist—or even to pay rent—in California." Opp. 9. This argument, however, ignores that newcomers still receive food stamps and that the food stamp benefit is increased by approximately $1 for every $3 in reduced TANF benefits. *See* Pet. App. 38a. Moreover, while the median monthly rent in Long Beach, California, may equal or exceed the amount of TANF cash assistance provided to respondent Roe, *see* Opp. at 8-9, there are numerous localities throughout the State where her monthly grant would cover the median cost of housing. *See Places, Towns and Townships* 327-40 (Deirdre A. Gaquin & Richard W. Dodge eds., 2d ed. 1998).

In any event, migrants to California may in some respects be better off than they were in their prior State notwithstanding the durational residency rule. As explained above, California provides to all residents a range of programs, including Medicaid coverage; child care; education, job training, and job placement services; cash assistance under diversion programs; transportation assistance; and food stamps. In addition, the rules of particular programs may be such that new residents are able to achieve a higher standard of living than they were in their prior State. For example, California has a generous earnings disregard which allows persons to disregard a substantial portion of their earned income while still retaining TANF benefits. *See* Cal. Wel. & Inst. Code § 11008.[9] While respondents have focused exclusively on the TANF program and its durational residency rule, *see* Opp. at 4, the existence of these other programs are surely relevant in answering the question of whether the State has imposed a penalty by denying new residents "the basic 'necessities of life.'" *See Memorial Hospital*, 415 U.S. at 259 (quoting *Shapiro*, 394 U.S. at 627).

Nor does California's rule impose an undue burden on the right to travel. As the Court explained in *Maher*, "there is only a semantic difference between" a claim that a state law "unduly interferes with" a fundamental right and a claim that the law "penalizes the exercise of that right." 432 U.S. at 474 n.8.

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[9] According to the Urban Institute, a California family of three with no unearned income or child care expenses can earn $1360 per month before losing eligibility for TANF benefits; the same family in Oklahoma can earn $730 per month before losing TANF benefits. *See One Year After Federal Welfare Reform* at 8-9.

Whether the analysis is formulated in terms of penalizing the right to travel or as "unreasonably burden[ing] or restrict[ing]" the exercise of the right, *Shapiro*, 394 U.S. at 629, it is clear that California's durational residency rule does not implicate strict scrutiny.

B. California's Durational Residency Rule Satisfies Rational Basis Review

Because California's rule does not penalize the right to travel, it is subject to rational basis review. The rule is entitled to the presumption of constitutionality and must be upheld if it is rationally related to legitimate governmental interests. *See Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970).

In *Shapiro*, the Court stated that "the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible." 394 U.S. at 629; *see also id.* at 631. This case is not controlled by *Shapiro* for two fundamental reasons.

First, recognizing the critical importance of durational residency rules for the purpose of welfare reform, Congress has expressly authorized California's rule. *See* 42 U.S.C. § 604(c). Most significantly, those persons likely to be affected by durational residency rules were represented in the national political process which enacted this legislation and which retains the power to repeal it. This case thus stands in stark contrast to *Shapiro*, where the Court held that Section 402(b) of the Social Security Act of 1935 (formerly codified at 42 U.S.C. § 602(b)), did not authorize the States' durational residency rules, *see* 394 U.S. at 639, and where new arrivals had no voice in the political process of the States which enacted the rules.

Second, the fundamental differences between the system created by the PRWORA and the AFDC program in existence at the time of *Shapiro* demonstrate why *Shapiro* is not controlling. While this case has been presented as a dispute about benefit levels, Congress more broadly authorized "[a] State operating a program funded under this part [to] apply to a family the rules . . . of the program funded under this part of another State. . . ." 42 U.S.C. § 604(c). This is of no small consequence given Congress' decision to radically restructure the welfare system and devolve to the States the authority and flexibility to experiment by creating their own rules aimed at moving welfare recipients into the work force and solving the other social problems associated with the AFDC system.

As explained above, States have adopted a variety of measures in reforming their welfare programs. There are now numerous and substantial differences between States in the manner in which they deal with recipients. Thus, unlike under the AFDC program with its largely uniform rules, there are now far more incentives for persons to migrate to other States. If the right to travel, as articulated in *Shapiro*, prohibits a State from ever treating new arrivals differently from longer term residents, welfare recipients will migrate to those States with the most favorable rules.

It is rational to think that migration to avoid the enforcement of program rules will jeopardize the success of welfare reform. It is also rational to think that States with greater benefits will become welfare magnets. *See* Paul E. Peterson & Mark C. Rom, *Welfare Magnets: A New Case for a National Standard* 79 (1990) ("A state offering high welfare benefits

will have a poverty rate 0.9 percent higher than a state providing low benefits. . . . These differences in poverty rates are most probably due to migration. . . ."); *see also* Todd Zubler, *The Right To Migrate And Welfare Reform: Time For Shapiro v. Thompson To Take A Hike*, 31 Val. U.L. Rev. 893, 933-38 (1997) (discussing empirical and anecdotal evidence supporting theory that high benefit States become welfare magnets). And it is likewise rational to think that States which become welfare magnets will ultimately be forced to reduce benefits and programs because of limited state resources and capped federal funding under PRWORA's block grant formula. *See, e.g.*, Peterson & Rom, at 55 ("[I]f benefits become too much higher than those in other states, policymakers will act to reduce them in order not to attract excessive numbers of poor people from other states."); Zubler, 31 Val. U.L. Rev. at 931-38.

That state durational residency rules such as California's reduce incentives to migrate does not render them constitutionally impermissible. While *Shapiro* states that "the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible," 394 U.S. at 629, it further makes clear that a state law which implicates the right to travel is constitutionally impermissible only if it rises to the level of a penalty.[10] *See id.* at 629-31 ("If a law has '*no other purpose* . . . than to chill the assertion of constitutional rights *by penalizing* those who choose to exercise them, then it [is] patently unconstitu-

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[10] Because the state durational residency rules authorized by 42 U.S.C. § 604(c) do not rise to the level of a penalty, Congress has not authorized the States to violate the Equal Protection Clause.

tional.' ") (quoting *United States v. Jackson*, 390 U.S. 570, 581 (1968)) (emphasis added). As explained above, California's law does not impose a penalty on the right to travel.

Both the Federal Government and the States have a substantial and permissible interest in ensuring that the States have the flexibility they need to experiment with welfare reform. This interest encompasses preventing the circumvention of state program rules, protecting States from becoming welfare magnets, and also protecting recipients from reductions in benefit levels and programs. Because state durational residency rules, such as California's, are rationally related to these interests, they satisfy the Equal Protection Clause.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1998

ELOISE ANDERSON, Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; and CRAIG L. BROWN, Director, California Department of Finance,

Petitioners,

v.

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR SIXTY-SIX ORGANIZATIONS SERVING DOMESTIC VIOLENCE SURVIVORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are sixty-six organizations engaged in service delivery, advocacy, and research on behalf of survivors of domestic violence.[1] They and their members include domestic violence shelters and counseling services from thirty-five states, public health professionals, and legal advocates committed to securing women's equality. Several *amici* are associations of low-income women, many of whom have suffered from family violence and who have needed Temporary Assistance for Needy Families ("TANF") in order to establish new homes away from abusive partners.

Amici are familiar with the needs of low-income families and have extensive knowledge of the plight of women and children struggling to escape their batterers. *Amici* have special expertise in the particular ways in which family violence traps women and children in poverty and dependency. *Amici* submit this brief to inform the Court of the harsh impact that durational welfare residency requirements will have on TANF families who move to another state to flee an abusive spouse or domestic partner.

The individual statements of interest of each *amicus* are appended to this brief. Letters from the parties consenting to the filing of this brief have been filed with the Court.

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

California's durational residency requirement for cash assistance harshly penalizes new state residents by denying them the very necessities of life: shelter, clothing, heat, food. The impact of welfare residency requirements is felt particularly keenly by women and children who migrate to another state to escape brutal, sometimes life-threatening domestic violence. This violence frequently escalates when the victim attempts to flee from her abuser, and can be so relentless that the victim must change her identity, move to another state, and abandon all ties to her former life. Welfare is a lifeline for these women and their children. Many have no other means of support and would otherwise be forced to choose between utter destitution and returning to their abusers.

Because abusers may control every aspect of their victims' lives and actively discourage their victims from holding jobs or completing their education, battered women face unique barriers to self-sufficiency. Most welfare recipients have work experience, but many have lost jobs or educational opportunities because of intentional interference or sabotage by abusive partners. Adequate levels of cash assistance are therefore essential if battered women are to survive on their own, apart from their abusers.

California's durational residency requirement does not rationally further any legitimate state interest in encouraging self-sufficiency. Its irrationality is particularly apparent in its impact on domestic violence survivors, for it punishes women who have courageously

fled from their abusers in order to secure a safe and independent future for themselves and their children. The severe deprivation of basic necessities that this penalty inflicts on new residents is likely to deter some battered women from escaping from their violent partners, thus subjecting them to further injury and abuse.

ARGUMENT

I. MILLIONS OF WOMEN ARE VICTIMS OF DOMESTIC VIOLENCE, AND SOME WILL SUFFER SERIOUS INJURY OR DEATH AT THE HANDS OF THEIR ABUSERS IF THEY CANNOT FLEE TO SAFETY.

As this Court has noted, "there are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands." *Planned Parenthood v. Casey*, 505 U.S. 833, 893 (1992) (plurality opinion); *id.* at 891 (approximately two million women each year are victims of severe assaults by their male partners; due to underreporting, true incidence of partner violence is probably double this estimate) (citing AMA Council on Scientific Affairs, *Violence Against Women* 7 (1991)); *see also* Patricia Tjaden & Nancy Thoennes, *Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey*, National Institute of Justice/Centers for Disease Control and Prevention at 2, 12 (Nov. 1998) [hereinafter *Violence Against Women Survey*] (25% of surveyed women said they were raped and/or physically assaulted by a current or former spouse, cohabiting partner, or date at some time in their lives; of all women who

reported being raped and/or physically assaulted in adulthood, three-quarters were victimized by a husband, partner, or boyfriend); *Domestic Violence: Not Just a Family Matter*, Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 103d Cong., 2d Sess. (June 30, 1994) [hereinafter *Domestic Violence: Not Just a Family Matter*] (statement of Senator Joseph Biden, Jr. reporting that an estimated three to four million women each year are battered by husbands, partners and boyfriends).[2]

Domestic violence is frequently severe, even life-threatening. Forty-one percent of women who have been physically assaulted by intimates report that they were injured during the most recent physical assault. *Violence Against Women Survey* at 9. About half of the women reporting domestic violence have been beaten severely. Joan Zorza, *Women Battering: High Costs and the State of the Law*, 28 Clearinghouse Rev. 383, 386 (1994). Tragically, many abusers assault not only their partners but their children, as well. *Casey*, 505 U.S. at 889; J.A. 102 (Dutton

[2] Although California Welfare and Institutions Code Section 11450.03 affects both men and women survivors of domestic violence, it disproportionately harms women, who comprise 83% of adults receiving Temporary Assistance to Needy Families ("TANF"), *see* U.S. Dep't of Health & Human Servs., *TANF Report to Congress, Demographic and Financial Characteristics*, pt. VII (1998), and who are significantly more likely than men to be assaulted by an intimate partner. *See Violence Against Women Survey* at 6-8. Two-thirds of cash assistance recipients are children. U.S. House Comm. on Ways & Means, 1996 Green Book, 104th Cong., 2d Sess., at 467 tbl. 8-25.

Aff. ¶ 7) (50% of severe batterers are also severely abusing the children in the home).[3] Domestic violence can be lethal: thirty percent of the women killed in the United States are murdered by their husbands or partners. *Casey*, 505 U.S. at 892 (citing *Domestic Violence: Terrorism in the Home*, Hearing before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources, 101st Cong., 2d Sess. 3 (1990)); U.S. Dep't of Justice, Bureau of Justice, *Violence by Intimates* at 39 (Mar. 1998) (reporting that, in 1996, 29% of female homicide victims were killed by an intimate).

Batterers exert control over their partners' lives directly by the use of force, but also by emotional abuse and economic coercion. Accompanying physical violence are "devastating forms of psychological abuse . . . including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support." *Casey*, 505 U.S. at 893.

> Domestic violence is based on a dynamic of power and control between the abuser and the abused. The abuser attempts to control, through physical violence and psychological abuse, the behavior of the victim or victims. . . . The batterer may have undermined the victim's self-confidence, making it even more difficult for her

[3] Even when they are not direct targets, children are harmed simply by witnessing family violence. J.A. 102 (Dutton Aff. ¶ 7); ABA, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association* at 1-2 (Aug. 1994).

> to live independently. For some women, traumatic reactions to the violence may affect their ability to function effectively and to "get back on their feet" once having left. Further, the batterer may have threatened harm to the victim and her children if the victim attempts to leave the batterer.

J.A. 101 (Dutton Aff. ¶ 4). Experts in the present case have made clear that "the batterer may control [the victim's] access to financial support, forcing her, if she considers leaving, to choose between homelessness and further abuse." *Id.* Furthermore, the greater a battered woman's economic dependence on her abuser, the more likely she is to be the victim of serious injury. Martha F. Davis & Susan J. Kraham, *Protecting Women's Welfare in the Face of Violence*, 22 Fordham L. Rev. 1141, 1151 (1995) [hereinafter Davis & Kraham, *Protecting Women's Welfare*].

In order to escape violence and create a safe environment for themselves and their families, battered women may find it necessary to flee, often in secrecy and in haste, with little more than the clothes on their backs. One victim of domestic violence described for Congress her flight to safety from an abuser:

> Sixteen years ago I packed everything that would fit into a single suitcase, left behind the few possessions I owned, took my two month old baby girl and ran for my life. . . . As I got on the airplane in Dallas that day, I knew that I would never go back and that I could now begin to create a future for my daughter and myself, a future of freedom and safety.

Id. at 1146 (citing testimony from Karla DiGirolamo in *Domestic Violence: Not Just a Family Matter*).

In order to escape violence and remain safe from their abusers, victims of domestic abuse need some source of financial support. This Court has noted that "[m]any abused women who find temporary refuge in shelters return to their husbands, in large part because they have no other source of income." *Casey*, 505 U.S. at 892 (citing Aguirre, *Why Do They Return? Abused Wives in Shelters*, 30 J. Nat. Ass'n Social Workers 350, 352 (1985)). As the U.S. Senate has recognized:

> [T]he availability of economic support is a critical factor in women's ability to leave abusive situations that threaten themselves and their children, and over 1/2 of battered women surveyed reported that they lacked resources to support themselves and their children. . . . [P]roposals to restructure the AFDC program may impact the availability of the economic support and the safety net necessary to enable poor women to flee abuse without risking homelessness and starvation for their families.

S. Con. Res. 66, 104th Cong. (1996) (enacted). Thus, "women's escape from violence in their own homes is dependent, to a great extent, on available financial resources." Davis & Kraham, *Protecting Women's Welfare* at 1153. In fact, the most likely predictor of whether an abused woman will be able to separate from her batterer permanently is whether she has sufficient economic resources. *Id.* (citing Edward W. Gondolf & Ellen R. Fisher, *Battered Women as Survivors* 95-96 (1988)).

Adequate financial support is particularly crucial in the months immediately following the abused woman's

separation from her batterer. Abusers do not lightly relinquish control over their victims, and batterers often escalate their violence after separation in an attempt to coerce women into reconciliation or to retaliate for their departures. J.A. 148 (Zorza Aff. ¶ 6); *see also* Mildred Pagelow, *Women Battering: Victims and Their Experiences* at 72 (1981);[4] Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 Violence and Victims 3, 7 (1993) (observing that battered women who leave their partners face an elevated homicide risk); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1, 5-6 (1991) ("At the moment of separation . . . the batterer's quest for control often becomes most acutely violent and potentially lethal."). Testifying before Congress, one survivor recounted her batterer's response when she tried to escape with her two small children: "You lied to me when you said our wedding vows and said until death do we part. That's the way it's going to be." Oversight Hearing on the Issue of Violence Against Women Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary,

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[4] As Pagelow notes, official reporters are replete with criminal cases describing serious bodily injury and murder committed by abusers in response to their victims' escape attempts. *See, e.g., Godfrey v. Georgia*, 446 U.S. 420, 424 (1980) (observing that the defendant, who was later convicted of murdering his wife soon after she left him and filed for divorce, abused her during their marriage); *see also Kansas v. Hundley*, 693 P.2d 475, 476 (1985) (noting that the defendant had attempted to escape her abusive husband but that he stalked, threatened, and beat her even after she left their home); *Pennsylvania v. Stonehouse*, 555 A.2d 772, 775 (1989) (discussing physical attack on woman following her attempt to escape her abuser).

102d Cong., 2d Sess. 7 (Feb. 6, 1992) (statement of Jane Doe on behalf of Victim Services). In spite of this grave danger, between 50 and 90 percent of battered women attempt to escape their abusers. Patricia Horn, *Beating Back the Revolution: Domestic Violence's Economic Toll on Women*, Dollars & Sense 21 (Dec. 1992).

Following separation, batterers intent on reasserting their control will often stalk their victims relentlessly. *See Violence Against Women Survey* at 10-11 (citing data showing that between one and six million women are stalked annually). Using personal contacts or creative strategies, abusers sometimes track down their former partners, even at secluded domestic violence shelters. Kathleen Ferraro & John Johnson, *The New Underground Railroad*, 6 Studies in Symbolic Interaction 337, 380-83 (1985) (describing case histories in which batterers obtained information from friends on the police force; used visitation with children to locate their victims; or begged for information from sympathetic taxi drivers). If the abuser knows where the children go to school or day care, he may use that knowledge to threaten or harass them, gain access to the mother, take them, or inflict further physical and sexual abuse on them. J.A. 102-103 (Dutton Aff. ¶ 7); Catherine T. Kenney & Karen R. Brown, *Report from the Front Lines: The Impact of Violence on Poor Women* at 17-18 (1996). Consequently, women threatened with separation assault may be unable to take refuge in local shelters or with nearby family or friends.

The danger for some women and children is so great that they must escape through an "underground railroad" system through which they are relocated and

assume an entirely new identity. Davis & Kraham, *Protecting Women's Welfare* at 1153. The safety of these women often requires that they cease all contact with family, friends and former employers.[5]

For these women, migrating to far-away places is their only chance to escape physically and emotionally abusive living situations. *See, e.g., Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993) (three named plaintiffs migrated to California with their children to escape abusive or dangerous living conditions), *aff'd*, 26 F.3d 95 (9th Cir. 1994), *vacated as unripe*, 513 U.S. 557 (1995); *Aumick v. Bane*, 612 N.Y.S.2d 766 (N.Y. Sup. Ct. 1994) (one plaintiff returned to New York, where family members were located, to escape an emotionally abusive relationship).[6]

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[5] In recognizing the danger to these women, the Social Security Administration has recently issued new policies which make it easier for victims of domestic violence to obtain new Social Security numbers so they cannot be easily tracked by their former abusers. *See* Robert Burns, *Government Plan Aims to Help Battered Women*, Boston Globe, Nov. 4, 1998.

[6] A study of TANF recipients who sought good cause exemptions from child support cooperation requirements revealed that 72% had changed residences to avoid an abusive partner; and 55% had moved to a different state to escape abuse. *See* Jessica Pearson et al., Center for Policy Research, *Child Support and Domestic Violence: The Victims Speak Out* at 15 (1998) [hereinafter Pearson, *Child Support and Domestic Violence*]. In fact, one domestic violence researcher has suggested that battered women be provided with a one-time payment to enable them to relocate to a new community. *See* Jody Raphael, Taylor Inst., *Trapped by Poverty, Trapped by Abuse* at iv (1997 & Supp. 1998).

In many cases, women will move to other states where they have family or friends who can provide at least some emotional and financial support. Without such support, these women risk being unable to secure basic necessities for themselves and their children – or being forced to return to dangerous and abusive relationships. For some women, the decision to flee a great distance to escape abuse is accordingly prudent and sometimes life-saving. As set forth *infra* Part III, deterring victims from fleeing to another state or penalizing them for having done so places them and their children at grave risk of serious harm.

II. DOMESTIC VIOLENCE IMPOVERISHES WOMEN BY DEPRIVING THEM OF EMPLOYMENT, EDUCATION, AND THE SUPPORTIVE RELATIONSHIPS NECESSARY FOR ECONOMIC INDEPENDENCE.

Congress has expressly recognized that between 50% and 80% of women who received welfare through Aid to Families with Dependent Children ("AFDC"), the predecessor to TANF, were survivors of domestic abuse. 142 Cong. Rec. S5220 (daily ed. May 17, 1996); 142 Cong. Rec. S8141 (daily ed. July 18, 1996). Recent research compellingly demonstrates this close relationship between domestic violence and poverty. *See* U.S. General Accounting Office, *Domestic Violence: Prevalence and Implications for Employment Among Welfare Recipients* (Nov. 1998) [hereinafter GAO *Domestic Violence Study*]; Jody Raphael, Taylor Inst., *Trapped by Poverty, Trapped by Abuse* (1997 & Supp. 1998) (compiling data from various studies). This research indicates that, while domestic abuse afflicts

women of all income levels, the incidence of abuse by a partner or former partner is higher among low-income women. U.S. Dep't of Justice, Bureau of Justice, *Violence Against Women: Estimates from the Redesigned Survey* 1 (Aug. 1995) (Women in families with incomes below $10,000 were more likely than other women to be victims of violence by an intimate.). Among low-income women who receive public assistance, the incidence of domestic violence is at its highest.

In Washington State, 55% of women on public assistance reported that they had been physically or sexually abused by an intimate partner as adults. *See* Washington State Institute for Public Policy, *Over Half of Women on Public Assistance in Washington State Reported Physical or Sexual Abuse as Adults* at 1 (Oct. 1993). Other studies have revealed similar results. In a New Jersey study of 846 women on AFDC, 57.3% reported that they had experienced physical abuse by an intimate. William Curcio, *Passaic County Study of AFDC Recipients in a Welfare-to-Work Program: A Preliminary Analysis* (1997) [hereinafter Curcio, *Passaic County Study*]. Similarly, the Worcester Family Research Project found that 60% of the AFDC recipients interviewed had been abused by intimate partners. Ellen L. Bassuk et al., *The Characteristics and Needs of Sheltered Homeless and Low-Income Housed Mothers*, 276 JAMA 640, 645 (Aug. 28, 1996) [hereinafter Bassuk, *Sheltered Homeless and Low-Income Housed Mothers*]. Of AFDC recipients surveyed by the University of Massachusetts, 57.7% revealed past or current serious abuse by an intimate. Mary Ann Allard et al., *In Harm's Way? Domestic Violence, AFDC Receipt and Welfare Reform in Massachusetts* (1997) [hereinafter Allard, *In Harm's Way?*]. Among 824

low-income women in Chicago, those receiving AFDC were more likely than non-recipient low-income women to have been victims of domestic violence: 33.8% of AFDC recipients and 25.5% of non-recipients had experienced "severe aggression," defined as kicking, hitting, biting, beating, injuring, raping, and threatening with or using a weapon. Susan Lloyd, *The Effects of Violence on Women's Employment* (1996).

The prevalence of domestic violence among welfare recipients is attributable to the fact that domestic violence often interferes with women's ability to sustain themselves economically. In fact, Congress has noted that

> violence against women dramatically affects women's workforce participation, insofar as 1/4 of battered women surveyed reported that they had lost a job due, at least in part, to the effects of domestic violence, and that over 1/2 of battered women reported that they had been harassed by their abuser at work. . . . [V]iolence against women is often exacerbated as women seek to gain economic independence.

S. Con. Res. 66, 104th Cong. (1996) (enacted).

In order to maintain exclusive access to and complete control over their victims, abusers often deliberately interfere with women's work and education efforts. *See* GAO *Domestic Violence Study* at 7; Jody Raphael, *Domestic Violence and Welfare Receipt: The Unexplored Barrier to Employment*, 3 Geo. J. on Fighting Poverty 29 (1995); Jody Raphael, Taylor Inst., *Prisoners of Abuse: Domestic Violence and Welfare Receipt* (1996). Caseworkers describe a variety of tactics that perpetrators use to prevent their partners from succeeding at work or school. These tactics include

repeated harassment of their partners, in person or over the phone; inflicting visible wounds, black eyes, broken teeth and cigarette burns before job interviews; hiding or destroying necessary work clothing or equipment; and reneging on agreements to provide child care. *See* Jody Raphael, Taylor Inst., *Prisoners of Abuse* at 6-7 (1996); GAO *Domestic Violence Study* at 7. In the New Jersey study, 39.7% of the respondents who were victims of abuse reported that their partner had actively prevented their participation in education and job training. Curcio, *Passaic County Study*. Another report found that abused women were fifteen times more likely than the non-abused women surveyed to have a partner who would not like them going to school or work. Allard, *In Harm's Way?* at 25. Thus, although most welfare recipients have work experience and express a desire for school or work, *see id.* at 13, 24, abusive partners often sabotage women's efforts toward self-sufficiency in order to keep their victims dependent and powerless.[7]

Thus, domestic violence both makes women poor and ensures that they remain poor. When violent partners prevent women from pursuing employment or training

[7] In addition to these barriers to success at work and school, women who have been victims of abuse may have sustained physical or mental health damage that makes employment difficult. GAO *Domestic Violence Study* at 8-9; Eleanor Lyon, National Resource Center on Domestic Violence, *Poverty, Welfare and Battered Women: What Does the Research Tell Us?* 1, 5 (1997); S. Con. Res. 66, 104th Cong. (1996) (enacted) (noting studies which show that the majority of battered women suffer from flashbacks, sleep disorders, and other problems that can impair their ability to secure and maintain employment).

activities, many of these women must rely on public assistance for support.[8] *See* Maria L. Imperial, *Self-Sufficiency and Safety: Welfare Reform for Victims of Domestic Violence*, 5 Geo. J. on Fighting Poverty 3, 4 (1997) [hereinafter Imperial, *Self-Sufficiency and Safety*]. As one expert has noted, "AFDC plays a key role in saving battered women's lives. . . . [A] monthly AFDC check provides the safety net necessary to allow women and children to escape violent situations and stay safe." Wendy Pollack, *Twice Victimized – Domestic Violence and Welfare "Reform"*, 30 Clearinghouse Rev. 329, 330 (1996).

Other sources of financial support are likely to be unavailable to domestic violence survivors. The survivor may not safely be able to seek child support from her abuser, because to do so would alert him to her new location, bring her into face-to-face contact with him at court proceedings, and possibly provoke further violence or retaliatory petitions for visitation or child custody. *See* Raphael, *Prisoners of Abuse* at 18. In most states, employees who quit their jobs involuntarily due to domestic violence are ineligible for unemployment compensation. Catherine K. Ruckelshaus, *Unemployment Compensation for Victims of Domestic Violence: An Important Link to Economic and Employment Security*, Clearinghouse Rev. 209, 217 n.42 (Special Issue 1996) (citing survey by federal Advisory Council on Unemployment Compensation).

[8] In fact, in Idaho, in 1996-97, over 70% of abuse victims in domestic violence shelters left the shelters as recipients of AFDC. Beatrice Thompson, *It Takes Time: A Study of Welfare Reform and Domestic Violence in Idaho* (1997).

Some abused women are forced to turn over their paychecks to their batterers, thus preventing the women from saving any money for their escape. Imperial, *Self-Sufficiency and Safety* at 16; Del Martin, *Battered Wives* 84 (1976) (describing battered woman who managed to save $1.75 over a two-year period which, with five dollars her grandmother sent her for Christmas, was just enough to cover cost of bus tickets for her escape). The social isolation that abusers inflict on their victims also deprives women of alternative sources of temporary financial support. *Casey*, 505 U.S. at 891-92 (citing L. Walker, *The Battered Woman Syndrome* 27-28 (1984)). Hence, for many victims of abuse, cash assistance is the only alternative to remaining in dangerous and violent relationships. It literally saves lives.

Adequate levels of public assistance are often the only way battered women can break free of their abusers and lead safe and self-sufficient lives. Financial security "often is the key factor that enables battered women and their children to leave and remain separated from their abusers. If public assistance were not available as a last resort, many battered women would be forced to remain in or return to dangerous or life-threatening situations." Davis & Kraham, *Protecting Women's Welfare* at 1144; *see also Casey*, 505 U.S. at 892 ("Returning to one's abuser can be dangerous.").

III. THE CALIFORNIA DURATIONAL RESIDENCY REQUIREMENT WILL HARSHLY PENALIZE DOMESTIC VIOLENCE SURVIVORS AND ACTUALLY DETER SOME WOMEN FROM PERMANENTLY ESCAPING THEIR ABUSERS.

The California durational residency requirement inflicts upon indigent families a substantial deprivation of "welfare aid upon which may depend the ability . . . to obtain the very means to subsist – food, shelter, and other necessities of life." *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969). When every dollar is needed for rent, heating fuel, and winter clothing for the children, depriving desperately poor women and children of even a small amount of cash assistance has catastrophic consequences.

The California residency requirement would markedly reduce many new residents' monthly grants. Brenda Roe and her family would have received $307 instead of the $565 provided to families who had resided in the state for over a year, barely enough to cover the rent on a studio apartment in her area, let alone other basic necessities. *Roe v. Anderson*, 966 F. Supp. 977, 980 (E.D. Cal. 1997). Likewise, Anna Doe would have received $330 each month, rather than the $456 that California provides to similarly situated longer-term residents, not enough even to cover the cost of rent.[9] *Id.*; *see also Green*, 811

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[9] Quoting one of the plaintiff's experts, Robert Greenstein, the district court observed that " '[b]ecause California's housing costs are high relative to most states and because welfare families in California are less likely than welfare families in any other state[ ] to live in subsidized housing, the residency requirement will place many recently arrived welfare families

F. Supp. at 517 (noting that plaintiff Deshawn Green moved back to California after escaping from her abuser in Louisiana, and would have received $190/month for herself and her two children instead of the full monthly California grant of $624); *Maldonado v. Houstoun*, 157 F.3d 179 (3d Cir. 1998) (finding that a $532 monthly reduction in the Maldonados' benefits imposed by Pennsylvania's durational residency requirement constituted "a 64% reduction in cash benefits and plainly penalize[d] them for having exercised their right to migrate into the state"), *petition for cert. filed* (Dec. 2, 1998). Far from having only a "remote and incidental" impact on the ability of low-income women and children to relocate to other states, *see* Pet. Br. at 25, durational residency requirements heavily burden new residents' freedom to travel.

Other public benefits available to low-income families do not replace the loss of a substantial portion of cash assistance benefits or mitigate the severity of the loss. The trial court in this case correctly rejected the state's argument that the availability of benefits such as food stamps,[10] Medical Assistance,[11] or homeless assistance

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on an inferior footing relative to welfare families in the state from which the newcomers moved.' " *Roe*, 966 F. Supp. at 981.

[10] Food stamps may be used only for the purchase of "eligible foods." 7 C.F.R. § 271.2 (1996). Food stamps cannot pay for rent, utilities, laundry detergent, diapers, soap, clothing, or transportation. *Id.*

[11] While Medical Assistance helps meet recipients' health care needs, it does not increase the income of poor families. Because families receiving TANF cannot afford to pay for health care, if Medicaid were unavailable, they would simply forego treatment until their health had degenerated to crisis levels.

grants[12] rendered its durational residency requirement constitutional.[13] While job training and placement services are helpful to some low-income families in need of assistance, these services do not increase the income of families temporarily unable to work or unsuccessful at finding paid employment.

The loss of significant portions of a family's cash assistance grant under these circumstances operates as a severe penalty for migrating to another state. The penalty is especially harsh for domestic violence survivors, because it "increase[s] domestic violence victims' risk of homelessness and malnutrition, as well as the likelihood

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Medicaid does not, therefore, free up resources for the family to use on housing, utilities, or other basic needs.

[12] Over 70 percent of the families receiving AFDC benefits in 1994 received no housing assistance. U.S. House Comm. on Ways and Means, 1996 Green Book, 104th Cong., 2d Sess. at 479.

[13] The State as well as several *Amici Curiae* supporting the Petitioners argue that the statutes invalidated in *Shapiro v. Thompson*, 394 U.S. 618 (1969), are distinguishable from the California statute in that the statutes at issue in *Shapiro* imposed a total denial of all benefits for a full year, whereas the California statute merely reduces benefits. As this Court pointed out, however, two of the three states whose laws were struck down in *Shapiro* offered new residents "partial assistance." *Shapiro*, 394 U.S. at 635. The relevant inquiry is not whether the state's denial of benefits can be characterized as "total," but rather whether the deprivation is "so severe and work[s] such serious inequities among otherwise qualified residents that they effectively penalize[ ] new residents for the exercise of their rights to migrate." *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 907 (1986) (plurality op.). Without doubt, the California statute works just such a severe inequity.

of their staying with or returning to their abusers."[14] Pollack, *Twice Victimized* at 341. As one expert noted, "the durational residency requirement may have the effect of colluding with the abuser's efforts to maintain power and control over his victim." J.A. 104-105 (Dutton Aff. ¶ 14). Dutton further explained:

> Often, abusers will stress that the victim "can't leave" and "has no place to go." By denying new residents adequate welfare support, the durational residency requirement reinforces this message and provides another tool for a batterer to use in keeping the woman in the house and under his control.

Id. Residency requirements thus undermine women's attempts to achieve self-sufficiency – the very value Congress sought to promote in enacting the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).

In fact, in the process of enacting PRWORA, Congress recognized that domestic violence may prevent some women from fulfilling, under the time constraints imposed, all of the requirements for TANF eligibility. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 602(a)(7) (1998). Thus, Congress passed the Family Violence Option to give

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[14] Not surprisingly, battered women make up a significant percentage of the homeless population. Davis & Kraham, *Protecting Women's Welfare* at 1146 (citations omitted); Bassuk, *Sheltered Homeless and Low-Income Housed Mothers* at 643 (finding that nearly two-thirds of women in Massachusetts shelters had been severely physically assaulted by an intimate partner as adults).

states more flexibility in applying the new TANF requirements to victims of domestic violence.[15] The sponsor of the Family Violence Option described why such a provision was needed:

> I want to make sure that these women and these children throughout our country, for whom the welfare system has been sometimes the only alternative to these very dangerous homes, receive the kind of special services and assistance that they need. In the absence of the passing of this amendment, all too many women and children could find themselves forced back into these very dangerous homes.

142 Cong. Rec. S8141 (daily ed. July 18, 1996) (statement of Sen. Wellstone).

Although the Family Violence Option permits states to waive residency requirements for victims of domestic violence, this provision does not effectively counter the problems the residency requirement creates for victims of abuse. Not all states have adopted the Family Violence Option.[16] Because no multi-tier welfare residency requirement like California's is currently in effect in any state, it is

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[15] The provisions of the Family Violence Option permit states to: (1) screen applicants for domestic violence while maintaining confidentiality; (2) provide referrals to counseling and other supportive programs; and (3) provide good cause exemptions for program requirements where compliance "would make it more difficult for individuals receiving assistance under this part to escape domestic violence or penalize such individuals who are or have been victimized by such violence, or individuals who are at risk of further domestic violence." PRWORA, 42 U.S.C. § 602(a)(7) (1998).

[16] As of September 1998, only twenty-four states had elected the Family Violence Option. GAO *Domestic Violence*

uncertain whether the states that have certified that they are adopting the Family Violence Option would treat residency requirements as a welfare rule that they would in fact be willing to waive. *See* Minn. Stat. §§ 256J.30, 256J.42, 256J.43 (1997) (explicitly waiving time limits and work requirements, but not one-year durational residency requirement, for domestic violence survivors who meet certain conditions); Wash. Admin. Code § 388-61-001(2)(e-f) (1997) (waiving time limits, child support cooperation requirements, and some work requirements, but not residency requirement, for domestic violence survivors).

Furthermore, even in those states that have fully implemented the Family Violence Option, waivers from TANF requirements are often difficult to obtain.[17] Women may not disclose the fact that they are being abused to their caseworkers, either because they do not know about the Family Violence Option or because they are too

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Study at 3. For example, neither Illinois nor Wisconsin, two states that have durational residency requirements as part of their TANF plans, has formally adopted the Family Violence Option. *See* Jody Raphael & Sheila Haennicke, *The Family Violence Option: An Early Assessment* (1998). Although California is developing standards to address domestic violence issues in its TANF program, *see* U.S. Dep't of Health & Human Servs., States Selecting the Family Violence Option (Mar. 31, 1998) <http://www.acf.dhhs.gov/news/welfare/congress/tanffvo.gif>, California is not among the twenty-four states reported by the GAO to have adopted the Family Violence Option.

[17] For example, as of August 1998, Alabama had granted only seven requests for work-related waivers; Minnesota and New Jersey had each granted just fifty such waivers. Jody Raphael & Sheila Haennicke, *The Family Violence Option: An Early Assessment* at 7-8 (1998).

ashamed and fearful to reveal this painful information to strangers. As this Court has noted, battered women are often psychologically unable to acknowledge that they are victims of abuse. *Casey*, 505 U.S. at 890 (finding that "[e]ven when confronted directly by medical personnel or other helping professionals, battered women often will not admit to the battering because they have not admitted to themselves that they are battered"). Other victims may fear that disclosure will result in retaliation from the abuser or the removal of their children. Finally, providing official documentation of abuse is difficult, if not impossible, for many victims of domestic violence, and those who lack such documentation are frequently denied waivers.[18]

Hence, in spite of California's asserted concern for domestic violence survivors, many families who flee to the state to escape abuse will be severely penalized by the durational residency scheme. They will suffer this penalty solely because they recently chose to migrate interstate. Such a penalty on the exercise of a fundamental right is plainly unconstitutional. *Shapiro*, 394 U.S. at 618; *see also Soto-Lopez*, 476 U.S. at 903 (plurality op.); *accord id.* at 920 (O'Connor, J., dissenting); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 258 (1974).

Furthermore, the durational residency requirement will actually prevent some battered women from making

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[18] Research into "good cause" waivers from child support cooperation requirements reveals that a very small percentage of recipients pursue these waivers and that two-thirds of those who do pursue them are denied, primarily because they are unable to produce adequate written documentation of abuse. Pearson et al., *Child Support and Domestic Violence* at 13-14.

their escape. If, after fleeing their abuser, they are unable to secure the most basic essentials, such as housing, winter heat, and clothing, they are likely to be deterred from establishing residence in a new state and will be driven to return to their abuser: "The fear of poverty or a greatly lowered standard of living is a major reason why women stay in abusive situations." Ginny McCarthy, *Getting Free: A Handbook for Women in Abusive Relationships* 11 (1986). Thus, reducing cash assistance to new residents increases the likelihood that domestic violence victims will conclude they have no choice but to stay with their batterers. As this Court observed in *Shapiro*:

> [Durational residency requirements are] well-suited to discourage the influx of poor families in need of assistance. An indigent who desires to migrate, resettle, find a new job, and start a new life will doubtless hesitate if he knows that he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence, when his need may be most acute.

394 U.S. at 629; *see also Maricopa County*, 415 U.S. at 257 (concluding that a person considering migration in search of a climate more desirable for his serious respiratory ailment "may hesitate if he knows that he must make the move without the possibility of falling back on the State for medical care. . . . ").[19] Similarly, domestic violence

[19] The plight of the lead plaintiffs in *Maldonado v. Houstoun* illustrates the deterrent effect of welfare residency requirements. Because of the drastic reduction in their grant, the Maldonados were forced to leave Pennsylvania and return to their former domicile before the district court issued a preliminary injunction. *See* Editorial, *Freedom Isn't Fair Price for Welfare*, Phila. Daily News, Oct. 15, 1997, at 32.

survivors confronted with homelessness and hunger are likely to be actually deterred from relocating to another state where they would be safe from abuse or close to supportive family and friends.

As this Court has previously held, a one-year welfare residency requirement does not rationally advance any legitimate state interest in encouraging employment. *See Shapiro*, 394 U.S. at 637-38. Its irrationality is poignantly apparent when its impact on domestic abuse survivors is considered. A law that deters women and children from escaping a life of violence and enforced dependency is directly at odds with the goal of fostering independent, self-sufficient families. It is also directly at odds with Congressional concern for the survival and safety of domestic violence victims and their children.

Because California Welfare and Institutions Code Section 11450.03 penalizes domestic violence survivors and will actually deter some battered women from permanently fleeing from their abusers, the judgment of the Ninth Circuit Court of Appeals should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

STATEMENTS OF INTEREST OF *AMICI CURIAE*

ALABAMA COALITION AGAINST DOMESTIC VIOLENCE

The Alabama Coalition Against Domestic Violence (ACADV) is a statewide network of eighteen domestic violence service agencies. A private, non-profit agency founded in 1978, ACADV has been extensively involved in efforts to protect the safety of battered women under the Personal Responsibility and Work Opportunity Reconciliation Act and its implementation in Alabama and other states. It has provided advocacy and technical assistance to the Alabama legislature and the Alabama Department of Human Resources and, most recently, trained over 650 eligibility, employment and training, child support and child welfare employees of the Alabama Department of Human Resources.

Because Alabama offers one of the lowest welfare benefit payments in the nation, domestic violence victims from Alabama are particularly likely to be negatively affected by reduction of cash assistance to that of the state of origin.

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

For well over a century, the American Association of University Women (AAUW), an organization of 150,000 members, has been a catalyst for the advancement of women and their transformations of American society. In more than 1,500 communities across the country, AAUW members work to promote education and equity for all

women and girls. AAUW plays a major role in activating advocates nationwide on AAUW's priority issues. AAUW promotes the social, economic, and physical well-being of all persons, including freedom from violence.

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN – PENNSYLVANIA

American Association of University Women – Pennsylvania (AAUW-PA) is a volunteer non-profit organization whose mission is education and equity for all women and girls. For over 100 years, AAUW-PA has advocated for equity for women in all aspects of their lives.

AMERICAN MEDICAL WOMEN'S ASSOCIATION

With branches across the United States, the American Medical Women's Association (AMWA) is a national organization of 10,000 women physicians dedicated to promoting women's health and fostering the professional development of women physicians. AMWA encourages its members, branches, and national officers to support and promote the end of violence against women of all ages. AMWA deplores the victimization and abuse of women and advocates development and implementation of an education curriculum at the medical school and post-graduate levels as well as development of programs in hospitals and health care facilities that provide appropriate care and support for victims of domestic violence.

AMERICAN PUBLIC HEALTH ASSOCIATION

American Public Health Association (APHA) is a national organization devoted to the promotion and protection of personal and environmental health. Founded in 1872, APHA is the largest public health organization in the world, representing over 50,000 public health professionals. It represents all disciplines and specialties in public health, including many of those who provide health care services to low-income families. Additionally, APHA passed a comprehensive policy designed to mobilize public health professionals and public health agencies in the public, private and voluntary sectors to engage in actions to prevent domestic violence.

ARIZONA COALITION AGAINST DOMESTIC VIOLENCE

The Arizona Coalition Against Domestic Violence is a private, non-profit coalition of statewide domestic violence victim service providers and others concerned about the issues of domestic violence and empowerment of battered women. Formed in 1980 by concerned citizens, professionals, and battered and formerly battered women, the Arizona Coalition works to increase public awareness of domestic violence through training and technical assistance programs; enhance the safety of and improve services for domestic violence victims; and advocate for systemic changes to make all systems more responsive to the needs of battered women.

AYUDA INC.

Ayuda's domestic violence program, founded in 1985, is the first program in the country to develop a comprehensive approach to addressing the needs of battered women who are immigrants and/or refugees. Ayuda has over eleven years of experience assisting thousands of immigrant battered women and their children in obtaining civil protection orders, child support, custody, divorce, immigration, housing, social services and emergency assistance matters. Ayuda represents a significant number of battered women and children who are eligible for relief under the Violence Against Women Act's immigration provision and has broad experience representing battered women in family court in custody and protection order cases. Ayuda is acutely aware of the devastating impact that witnessing violence in the home can have on children and has a Latino Children's Program specifically designed to counter these effects.

Informed by years of direct client representation, Ayuda's domestic violence program constantly strives to fulfill its dual role as a national advocate and an educator on issues of domestic violence and immigration. Ayuda is a co-coordinator of and the Washington voice for the National Network on Behalf of Battered Immigrant Women. In that role, it serves as a liaison between advocates for immigrants and advocates for battered women.

BATTERED WOMEN'S LEGAL ADVOCACY PROJECT

The Battered Women's Legal Advocacy Project (BWLAP) is a Minnesota statewide program which provides legal advice, consultation, training, litigation and policy development assistance to battered women's advocates, attorneys representing battered women, judges, law enforcement officers, prosecutors, and others on domestic violence legal issues. BWLAP is the only statewide program which has as its mission to improve the legal system's response to the victims and perpetrators of domestic violence. BWLAP works with advocates who assist battered women who have been forced to move from their previous state to escape the very real and serious threat of violence by their abuser.

CALIFORNIA ALLIANCE AGAINST DOMESTIC VIOLENCE

The California Alliance Against Domestic Violence is a California coalition of domestic violence organizations dedicated to ending violence against women and girls through policy development, training, education, and coalition building. The Alliance has a twenty-year history, and in 1993, it incorporated as a 501(c)(3) non-profit corporation.

CALIFORNIA NATIONAL ORGANIZATION FOR WOMEN

The California National Organization for Women (CA NOW) is a non-profit organization dedicated to securing social and economic equity for women. Its priorities

include ending violence against women, ensuring reproductive rights for all women, eliminating gender and race discrimination, and securing lesbian rights. CA NOW works to achieve these goals through direct and grassroots lobbying, community education, and promoting feminist political candidates.

CALIFORNIA WOMEN LAWYERS

California Women Lawyers (CWL) is a non-profit corporation and professional organization whose membership includes attorneys of both genders, judges, and law students who either work, live or attend law school in California. CWL's charter is to "advance women in the profession of law; to improve the administration of justice; to better the position of women in society; to eliminate all inequalities based upon sex; and to provide an organization for collective action and expression germane to the aforesaid purposes."

CWL has actively participated in developing policy related to "welfare reform" efforts in California, and has participated in research projects which examine the connection between domestic violence victims and public assistance recipients. CWL's board of directors has consistently maintained working committees focusing on domestic violence and has created a subcommittee to investigate and address the impact of new legislation on indigent women and children in California.

CALIFORNIA WOMEN'S LAW CENTER

The California Women's Law Center (CWLC) is a private, non-profit public interest law center specializing in the civil rights of women and girls. The California Women's Law Center was established in 1989 to address the comprehensive civil rights of women and girls in the following priority areas: sex discrimination in education and employment, reproductive rights, family law, violence against women, and child care. Since its inception, the CWLC has placed a strong emphasis on protecting the rights of women who are victims of domestic violence.

CENTER FOR ECONOMIC OPTIONS

The Center for Economic Options, Inc. is a non-profit statewide organization committed to promoting equity and improving the economic position of West Virginians. Its primary focus is to provide for equal participation of women in economic leadership, community development, and gainful employment, with a special commitment to those women who have historically been excluded from these roles in society.

CENTER FOR WOMEN POLICY STUDIES

The Center for Women Policy Studies is a national non-profit, multiethnic, and multicultural feminist policy research and advocacy institution. The Center has been a leader in research, policy analysis and advocacy on violence against women since its founding in 1972. It has actively sought, since 1995, to ensure a strong Family

Violence Option in the federal Temporary Assistance for Needy Families program.

COLORADO COALITION AGAINST DOMESTIC VIOLENCE

The Colorado Coalition Against Domestic Violence is a statewide coalition of fifty-seven domestic violence programs. Founded in 1977, the Coalition's mission is to eliminate domestic violence in Colorado by providing community education, professional training, membership services, and public policy development.

DISTRICT OF COLUMBIA COALITION AGAINST DOMESTIC VIOLENCE

The District of Columbia Coalition Against Domestic Violence (DCCADV), a non-profit organization for battered women, is committed to providing coordinated services for victims of domestic violence in the community through public policy, public education and awareness, training and development and victim advocacy for women and their children. Established in 1986, DCCADV coordinates efforts at all levels of the domestic violence response and crime prevention systems.

EQUAL RIGHTS ADVOCATES

Equal Rights Advocates, Inc. (ERA) is a San Francisco-based, non-profit, public interest law firm dedicated to securing legal and economic equality for women through litigation, advocacy, and public education, particularly in the area of employment. Since its inception twenty-five years ago, ERA has represented plaintiffs in

numerous sexual harassment, sex discrimination, and pregnancy discrimination cases. ERA has also worked on many advocacy campaigns that sought to establish economic and workplace protections for low-income women. With the advent of welfare reform, ERA successfully pursued public policy initiatives on behalf of welfare recipients in California. ERA is also the lead state agency for a coalition of California community-based organizations that serve welfare recipients. ERA recently developed the Immigrant Women & Welfare Project, a research and advocacy project that seeks to document the barriers that immigrant women in California face as they attempt to move from welfare to work. Based on our interviews with immigrant women on welfare, we are finding that a large percentage of the women are or have been victims of domestic violence.

FAMILY VIOLENCE PREVENTION FUND

The Family Violence Prevention Fund is a national, non-profit organization that focuses on domestic violence education, prevention, and public policy. The mission of the fund is to stem the epidemic of domestic violence in our homes by developing prevention and education strategies in the justice, child welfare, public education, and public health fields. Founded in 1980, the Fund is nationally recognized for its pioneering work to improve the justice, health care, and child welfare system's response to domestic violence. As part of its commitment to justice system improvement, the Fund advocates elimination of legal barriers that inhibit a woman's ability to flee domestic violence to secure her and her children's safety.

FLORIDA COALITION AGAINST DOMESTIC VIOLENCE

The Florida Coalition Against Domestic Violence (FCADV) represents all of Florida's thirty-eight certified domestic violence centers, where shelter and support are available for thousands of domestic violence survivors and their families each year. Since its founding twenty years ago, FCADV has been the voice of domestic violence survivors and their children in this state. In addition to providing services and resources for the centers, FCADV is the statewide policy maker on domestic violence issues, facilitating the creation of domestic violence task forces throughout Florida and operating a legal clearinghouse of attorneys who provide pro bono legal representation for survivors of domestic violence in courts throughout the state. More than 2500 survivors have received such legal services since November of 1997.

GEORGIA COALITION ON FAMILY VIOLENCE, INC.

The Georgia Coalition on Family Violence is a non-profit, statewide organization comprised of and serving battered women's shelters, programs, organizations, and individuals. The Coalition works for changes in policies and procedures which will help to improve the health and well-being of battered women and their children. Its members have participated in the formulation of Georgia's plan for implementation of Temporary Assistance for Needy Families and the Coalition remains active in training welfare workers on the Family Violence Option.

HAWAII STATE COALITION AGAINST DOMESTIC VIOLENCE

The Hawaii State Coalition Against Domestic Violence, a private, non-profit organization, is a statewide coalition of fourteen domestic violence programs working collaboratively to affect public policy and establish a coordinated and consistent response for the safety and protection of battered women. Our goals include public recognition of domestic violence as a pervasive societal problem, detrimental to all members of society, rather than a personal problem; and the obliteration of racism, sexism, and homophobia which contribute to domestic violence.

ILLINOIS COALITION AGAINST DOMESTIC VIOLENCE

The Illinois Coalition Against Domestic Violence (ICADV) is a non-profit organization, incorporated in the state of Illinois, dedicated to the elimination of domestic violence. Founded in 1978, ICADV is a statewide network of forty-eight local domestic violence programs which provide services to domestic violence victims and their children, and which seek to prevent and eliminate domestic violence through community education and public policy advocacy. In 1997, we provided services to 47,887 women and children. Of the adults we served, 16.9% were TANF recipients.

IOWA COALITION AGAINST DOMESTIC VIOLENCE

The Iowa Coalition Against Domestic Violence (ICADV) is a non-profit organization, incorporated in the

state of Iowa in 1985. ICADV provides educational and technical assistance to the domestic violence programs across Iowa, and also acts on a statewide level to promote public policy and legislative solutions to the problems of battered women and their children. ICADV's purpose is to eliminate personal and institutional violence against women through support to programs providing safety and services to battered women and their children.

JANE DOE INC., MASSACHUSETTS COALITION AGAINST SEXUAL ASSAULT AND DOMESTIC VIOLENCE

Jane Doe Inc., Massachusetts Coalition Against Sexual Assault and Domestic Violence is a membership organization of thirty-nine battered women's programs and rape crisis centers in the state. Its primary areas of focus are public policy, member services, and community education. Its mission is to advocate for battered women and their children, and survivors of sexual abuse in the Commonwealth of Massachusetts by creating an integrated community response to domestic violence. It is committed to eliminating barriers to safety and family stability that are created by limiting access to financial assistance.

KANSAS COALITION AGAINST SEXUAL & DOMESTIC VIOLENCE

The Kansas Coalition Against Sexual and Domestic Violence (KCSDV) is a not-for-profit coalition of domestic violence and sexual assault agencies in Kansas. KCSDV provides training, support, technical assistance, and advocacy on legislative issues for its twenty-eight member programs. Its welfare reform project is a collaborative

effort between KCSDV and the Kansas Department of Social and Rehabilitation Services (SRS). The project involves intensive training for SRS workers on issues surrounding domestic violence, presentations to TANF recipients about domestic violence and an on-site domestic violence advocate in the SRS office. KCSDV is committed to addressing the connection between economic oppression and violence against women.

KENSINGTON WELFARE RIGHTS UNION

The Kensington Welfare Rights Union (KWRU), one of the plaintiffs in *Maldonado v. Houstoun* challenging Pennsylvania's one-year multi-tier residency requirement for cash assistance, is a Philadelphia-based welfare rights organization whose members include many survivors of domestic violence. KWRU members have moved to Pennsylvania from Puerto Rico, North Carolina, Tennessee, New York, and Kentucky. A large proportion – probably half – of KWRU's members have fled domestic violence at some point in their lives. Some of our members have had guns pulled on them, have been badly beaten and punched in the face, have had their hair ripped out, have been strangled and worse. One woman's abusive husband dragged her through the street by her hair. Often the abuse has occurred with their children watching.

KENTUCKY DOMESTIC VIOLENCE ASSOCIATION

The Kentucky Domestic Violence Association (KDVA) is a non-profit organization that provides training, technical assistance and support services to Kentucky's seventeen spouse abuse centers. These centers

help thousands of Kentuckians each year through shelter, education, counseling, and solving problems of interstate enforcement of protective orders, a particularly important issue in Kentucky which is bordered by seven other states. Most states which border Kentucky provide higher welfare benefits than families can receive here. As a result, women from Kentucky seeking to escape violence would be disadvantaged by policies that tied their benefits in a new state to Kentucky's benefit levels.

LOUISIANA COALITION AGAINST DOMESTIC VIOLENCE

The Louisiana Coalition Against Domestic Violence (LCADV) is a not-for-profit organization incorporated in the State of Louisiana in 1982. It is a statewide network of battered women's programs, other organizations, and individuals who share the goal of ending violence against women and children in Louisiana and throughout the world. LCADV empowers its members through advocacy, education, resource development, technical assistance and dissemination of a bimonthly newsletter.

MARYLAND NETWORK AGAINST DOMESTIC VIOLENCE

The Maryland Network Against Domestic Violence (MNADV), founded in 1981, is a statewide coalition of victim services programs, criminal justice agencies, community organizations, and individuals committed to the elimination of domestic violence through advancing public and professional awareness, implementing special initiatives, and improving legislation and policy. MNADV membership includes all of Maryland's twenty-four

domestic violence programs serving every area of the state. MNADV works to ensure that diverse communities speak in a unified voice to achieve an end to domestic violence, and to ensure that practices which discriminate against battered women are recognized and corrected.

MICHIGAN COALITION AGAINST DOMESTIC AND SEXUAL VIOLENCE

The Michigan Coalition Against Domestic and Sexual Violence (MCADSV) is a non-profit organization incorporated in the state of Michigan for the purpose of providing services and advocacy on behalf of the victims of sexual assault and domestic violence and their minor children. MCADSV is a membership organization of domestic violence and sexual assault service provider agencies, and other supportive agencies and individuals committed to ending domestic and sexual violence in Michigan.

Welfare policy work is of particular interest to MCADSV because of the profound impact such policy has on victims of domestic violence who must rely on programs such as TANF to escape abusive relationships.

MINNESOTA COALITION FOR BATTERED WOMEN

The Minnesota Coalition for Battered Women (MCBW) is a membership organization consisting of local, regional, and statewide organizations that provide services to battered women and their children. It works to change systems and institutions so that they can respond to battered women and their children more effectively, empower member organizations, network with other

organizations which address the broader needs of battered women, and provide leadership on a regional and national level.

MISSOURI COALITION AGAINST DOMESTIC VIOLENCE

The Missouri Coalition Against Domestic Violence (MCADV) is a statewide, non-profit membership organization of the agencies, organizations and individuals providing services to victims of domestic violence and their children. Founded in 1980, its mission is to provide education on domestic violence; advocate public policy to alleviate and prevent domestic violence; provide technical assistance and training to those programs and systems addressing the needs of domestic violence victims; provide opportunities for communication among advocates; and provide research on domestic violence.

In a crossroads state such as Missouri, domestic violence victims who are recipients of public assistance often must move to a different state where they cannot be found by their abusers. Durational residency requirements will have a devastating impact on the abilities of these women to protect themselves and their children from domestic violence.

NATIONAL ASSOCIATION OF SOCIAL WORKERS

The National Association of Social Workers (NASW) is a professional membership organization comprised of more than 155,000 social workers with chapters in every state. Since 1955, the NASW has had as its purposes to develop and disseminate high standards of practice while

strengthening and unifying the social work profession as a whole and improving the quality of life through the utilization of social work skills. In its "Policy on Public Child Welfare," NASW urged social workers to address the vulnerability of women and people of color in the delivery and receipt of public welfare services.

NATIONAL BLACK WOMEN'S HEALTH PROJECT

The National Black Women's Health Project is a non-profit organization based in Washington, D.C. committed to defining, promoting, and maintaining the physical, spiritual, mental, and emotional well-being of Black women. Intimate partner violence is a pervasive threat to Black women's health. Factors such as unemployment, poverty, poor housing, lack of financial resources, job loss, increasing isolation from family, a lack of social supports, homelessness, poor social and educational skills, unwanted pregnancy, and being raised in a violent home, all contribute to family disorganization. Residency requirements that restrict access to welfare benefits impede a woman's ability to break free of her abuser and begin the process of healing herself and her children.

NATIONAL COALITION AGAINST DOMESTIC VIOLENCE

The National Coalition Against Domestic Violence (NCADV) is dedicated to the empowerment of battered women and their children and is therefore committed to the elimination of personal and societal violence in the lives of women and their children. Crucial to empowering battered women and their children is ensuring that

they have the financial ability to escape the abuse in their lives. In order to flee violence and protect her children, a woman may have to move to a different state where her batterer cannot find her or her children. NCADV believes that governmental financial assistance should be made available to all indigent, battered women and their children. It is an essential component of the effort to eradicate violence against women and children.

NATIONAL COALITION AGAINST SEXUAL ASSAULT

The National Coalition Against Sexual Assault (NCASA) is a non-profit membership organization. Founded in 1978, NCASA's members include over 450 rape crisis centers, sexual assault prevention programs, women's centers, individuals, and allied organizations. From its inception, NCASA has been recognized as a major forum and force for eliminating violence against women.

NCASA's activities include an annual conference addressing treatment, research, awareness, and program development. It publishes *NCASA News*, fact sheets and public policy updates. The information it circulates is based on survivor reports, expert literature, and NCASA oversight of the legal system. NCASA provides current, accurate and comprehensive information to victim service providers, public policy makers, media, members, and the public. Through its Public Policy Committee, NCASA educates policy makers, networks with other organizations, and issues policy statements.

NATIONAL COUNCIL OF JEWISH WOMEN

The National Council of Jewish Women Inc. (NCJW), is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to protect individual rights and freedoms for all. Founded in 1893, the National Council of Jewish Women has 90,000 members in over 500 communities nationwide. NCJW's *National Priorities* state, "We endorse and resolve to work for the elimination and protection from all forms of harassment, violence and abuse against women."

NATIONAL COUNCIL OF NEGRO WOMEN

The National Council of Negro Women, Inc. (NCNW) is a voluntary, non-profit, membership organization helping women to improve the quality of life for themselves, their families, and the community. Through its national affiliate organizations and 250 community-based sections, NCNW has an outreach to four million women, all contributing to the peaceful solutions of problems of human welfare and rights. Founded in 1935, NCNW sponsors educational, economic, social, cultural, and scientific self-help projects nationally and in specific communities across the nation. Through its projects, the NCNW strives to achieve equality of opportunity and eliminate prejudice and discrimination based upon race, creed, color, sex, or national origin.

NATIONAL ORGANIZATION FOR VICTIM ASSISTANCE

Founded in 1975, the National Organization for Victim Assistance (NOVA) is the oldest national group dedicated to championing victim rights and services in the worldwide victims' movement. A non-profit membership organization, NOVA is guided by four purposes: to be an educational resource to colleagues in the field, to be of service to our members, to be of direct assistance to victims of crime and other traumatic events, and to be an advocate for victim rights and services.

NATIONAL ORGANIZATION FOR WOMEN FOUNDATION

The National Organization for Women Foundation (NOW Foundation) is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with a membership of over 200,000 women and men in more than 600 chapters in all fifty states and the District of Columbia. Since its inception in 1986, a major goal of NOW Foundation has been to ensure full equality for women, including economic equity, and to put an end to violence against women.

NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES

The National Partnership for Women & Families (National Partnership) is a non-profit, national advocacy organization that promotes fairness in the workplace, quality health care, and policies that help women and

men meet the dual demands of work and family. Established in 1971 as the Women's Legal Defense Fund, the National Partnership has worked to advance the rights and interests of women – especially low-income women and women of color – and their families, through public education, technical assistance to federal and state policymakers and advocates, and participation as *amicus curiae* in federal and state courts.

The National Partnership has long addressed the unique barriers faced by women subjected to domestic violence. In 1979, the National Partnership founded the first shelter for battered women in the District of Columbia, My Sister's Place. The National Partnership has also provided direct legal services to women seeking protection orders in DC.

NATIONAL WOMEN'S LAW CENTER

The National Women's Law Center is a non-profit organization that has worked since 1972 to advance and protect women's legal rights. The Center focuses on major policy areas of importance to women and their families, including family support, income security, employment, education, and reproductive rights and health, with special attention to the needs of low-income women. The Center has participated as counsel, provided assistance, or participated as *amicus curiae* in a range of cases interpreting the requirements of a host of public benefit programs. The Center also advocates, at the federal, state, and local levels, for welfare and child support policies that will help low-income women achieve greater economic security and escape abuse, and provides direct

assistance to low-income women in the District of Columbia dealing with domestic violence and other issues.

NEBRASKA DOMESTIC VIOLENCE SEXUAL ASSAULT COALITION

The Nebraska Domestic Violence Sexual Assault Coalition is a statewide advocacy organization committed to reducing violence against women and children in Nebraska. Its primary purpose is to provide training, technical assistance and peer support to the twenty-two community-based domestic violence and sexual assault programs throughout the state. Its broader mission is to increase public awareness and understanding about these issues and to support the development of more effective community and institutional responses through coordination of statewide education programs and public policy initiatives. The Coalition works tirelessly to help women and children find safe havens and to expose beliefs that protect and promote violence in the home. It also collaborates with courts, law enforcement offices, prosecutors, and probation officers to make systemic changes in the way domestic violence is handled in the justice system.

NEW HAMPSHIRE COALITION AGAINST DOMESTIC & SEXUAL VIOLENCE

The New Hampshire Coalition Against Domestic & Sexual Violence is a statewide network of fourteen independent member programs committed to ending domestic and sexual violence. The Coalition ensures that high-quality services are provided to victims/survivors of domestic and sexual abuse. Because the Coalition recognizes that violence and oppression are connected, we

promote social change by empowering victims and by holding systems accountable for their responses to domestic and sexual violence.

For the past two years, the Coalition has been working with the New Hampshire Department of Health and Human Services to implement the Family Violence Option. However, the Coalition recognizes that the Family Violence Option is not sufficient to protect all victims of domestic violence and that durational residency requirements will hurt some victims who must flee to other states in order to escape abuse.

NEW JERSEY COALITION FOR BATTERED WOMEN

The New Jersey Coalition for Battered Women (NJCBW) is a statewide coalition of domestic violence service programs and concerned individuals whose purpose and mission is to end violence in the lives of women. Incorporated in 1979, NJCBW is a private, non-profit corporation, whose members include all twenty-three domestic violence programs in New Jersey. NJCBW advocates for battered women with state-level governmental and private agencies, the state legislature, judiciary and governor to support legislation and policies that will increase the safety and options of victims of domestic violence. It also provides information, resources, technical assistance and training to domestic violence programs, the public and those agencies, organizations and individuals involved with New Jersey's response to domestic violence. Recently, NJCBW has strenuously advocated for the adoption of fair and realistic welfare policies in New Jersey that reflect and acknowledge the

strong correlation between domestic violence and the need for state assistance, and that respond to the real-life threats victims and their children face.

NEW MEXICO COALITION AGAINST DOMESTIC VIOLENCE

The New Mexico Coalition Against Domestic Violence (NMCADV) is a non-profit organization incorporated in the state of New Mexico in 1981 for the purpose of providing advocacy for and assistance to families impacted by domestic violence. Thirty member locations provide emergency shelter, counseling, hotlines, legal advocacy, transitional housing, youth violence prevention programs, and public policy advocacy. In the past fiscal year, member programs served 16,400 individual clients.

The Coalition recognizes that any impediment to the ability of domestic violence victims to move from state to state jeopardizes the safety of victims and their children.

NEW YORK STATE COALITION AGAINST DOMESTIC VIOLENCE

The New York State Coalition Against Domestic Violence (NYSCADV) is a non-profit membership organization. Coalition members include shelters, safe home projects, advocacy programs, and counseling projects, as well as concerned individuals who share the goal and philosophy of providing services to battered women and their children and eradicating family violence through advocacy, education, public awareness and program development.

NORTH DAKOTA COUNCIL ON ABUSED WOMEN'S SERVICES

The North Dakota Council on Abused Women's Services is a coalition of twenty community-based domestic violence centers around the state. The coalition has been active in a broad array of issues affecting battered women and their children for over twenty years. Recently, the Coalition partnered with a statewide reform monitoring project, and has attempted to track the impact of welfare reform on victims of domestic violence. The Coalition is concerned that welfare residency requirements threaten the safety and welfare of vulnerable people who may literally be fleeing for their lives.

NORTHWEST WOMEN'S LAW CENTER

The Northwest Women's Law Center is a non-profit public interest organization dedicated to protecting the legal rights of women through litigation, education, legislation and the provision of legal information and referral services. Since its founding in 1978, the Law Center has worked actively on all fronts to protect and advance the legal rights of women and children throughout Washington and the Pacific Northwest. The Northwest Women's Law Center has worked on many fronts to eliminate violence against women. In particular, the Law Center was a leader in strengthening Washington's domestic violence laws and has assisted attorneys who have sought asylum for their clients under the Violence Against Women Act (VAWA). Currently, the Law center is co-counsel for plaintiffs in a case challenging Washington State's multi-tier durational welfare residency requirement.

OHIO DOMESTIC VIOLENCE NETWORK

The Ohio Domestic Violence Network (ODVN) is a non-profit membership organization incorporated in the state of Ohio. ODVN is an organization of shelters, domestic violence programs, batterer intervention programs, legal advocacy programs, and other legal, social service or advocacy organizations providing services and advocacy to victims and perpetrators of domestic violence. ODVN also provides training and technical assistance to domestic violence programs, the legal community, the medical community, the social service community and other interested parties on issues of domestic violence. It operates a toll-free information and referral line that provides access to local domestic violence program hotlines twenty-four hours a day.

OKLAHOMA COALITION AGAINST DOMESTIC VIOLENCE AND SEXUAL ASSAULT

The Oklahoma Coalition Against Domestic Violence and Sexual Assault (OCADVSA) is an Oklahoma based non-profit professional membership organization of domestic violence and sexual assault providers. Since its incorporation in July, 1981, OCADVSA has advocated for safety for victims of domestic violence and sexual assault, for the elimination of violence from the lives and homes of every citizen in the state of Oklahoma. OCADVSA counsels victims of domestic violence and sexual assault and their children, provides advocacy and case management services, and works with Oklahoma's legislature and governmental officials to improve public policy and response for victims.

PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE

The Pennsylvania Coalition Against Domestic Violence, Inc. (PCADV) is a not-for-profit organization incorporated in the Commonwealth of Pennsylvania for the purpose of providing services and advocacy on behalf of the victims of domestic violence and their minor children. PCADV is a membership organization of sixty-four shelters, hotlines, counseling programs, safe home networks, legal advocacy projects, and transitional housing projects for battered women and their dependent children in the Commonwealth.

For more than twenty years, PCADV has provided training and technical assistance to domestic violence programs, courts, law enforcement agencies, and bar associations on the issues of domestic violence and the safety needs of battered women and children.

PENNSYLVANIA NOW, INC.

Founded in 1972, Pennsylvania NOW, Inc. is a statewide non-profit membership organization affiliated with the National Organization for Women. Through grassroots organizing efforts, Pennsylvania NOW's thirty-seven chapters with over 9,000 members work to eliminate discrimination against women based on race, economic status, age, sexual orientation, religious affiliation, ethnic origin, and/or disability. Within the past two years, Pennsylvania NOW has worked closely with other organizations in the state to oppose punitive welfare measures. Specifically, although Pennsylvania has

adopted the Family Violence Option, many domestic violence survivors remain subject to welfare program requirements they cannot meet because Pennsylvania does not consistently screen applicants for abuse or offer program waivers to victims who do not have current Protection From Abuse orders or other documentation that they are in danger.

POVERTY LAW PROJECT OF THE NATIONAL CLEARINGHOUSE FOR LEGAL SERVICES

The Poverty Law Project (PLP) of the National Clearinghouse for Legal Services is a non-profit public interest law firm that provides free legal representation to poor people about welfare and housing policy issues. The PLP advocates on behalf of victims and survivors of domestic violence because welfare and housing policies have a significant impact on the quality of their lives. The PLP is interested in exposing the relationship between welfare and housing policies, the increased risk of physical and emotional harm, and the economic injury domestic violence inflicts on women. The PLP attorneys represent the plaintiffs in *Hicks v. Peters*, 10 F. Supp.2d 1003 (N.D. Ill. July 17, 1998), a class-action lawsuit that successfully challenged Illinois' durational residency requirement.

RHODE ISLAND COALITION AGAINST DOMESTIC VIOLENCE

The Rhode Island Coalition Against Domestic Violence is a non-profit organization representing the six domestic violence agencies in Rhode Island. Since 1978, the Rhode Island Coalition has been the voice for victims

of domestic violence in the state by advocating for improved laws, systems and services.

SOUTH CAROLINA COALITION AGAINST DOMESTIC VIOLENCE & SEXUAL ASSAULT

The South Carolina Coalition Against Domestic Violence and Sexual Assault (SCCADVASA) is a non-profit, statewide organization formed in 1981 to represent the critical needs of victims/survivors of domestic violence and sexual assault. SCCADVASA is a membership organization of thirty-three domestic violence organizations, rape crisis centers, and sexual assault programs. Each program provides emergency shelters, crisis intervention, support services, advocacy, community education and training, and outreach programs.

SOUTH DAKOTA COALITION AGAINST DOMESTIC VIOLENCE AND SEXUAL ASSAULT

The South Dakota Coalition Against Domestic Violence and Sexual Assault (SDCADVSA) is a non-profit organization founded in 1979. SDCADVSA is dedicated to the empowerment of battered women and their children and therefore is committed to the elimination of personal and societal violence in the lives of women and their children.

SUCCESS AGAINST ALL ODDS

Success Against All Odds (SAAO) is a non-profit organization dedicated to helping low-income families achieve economic independence. SAAO is composed primarily of current and former cash assistance recipients in

central Pennsylvania. Most members are single mothers. A major focus of the organization is to address the barriers faced by parents attempting to leave welfare. A number of SAAO members are survivors of domestic violence who could not have escaped from their abusive partners without assistance from TANF.

TENNESSEE TASK FORCE AGAINST DOMESTIC VIOLENCE

The Tennessee Task Force Against Domestic Violence (TTFADV) is a private, non-profit grassroots organization composed of shelters, programs, and individuals dedicated to working to end violence in the lives of battered women and their children, and to change the institutions that condone and promote such violence.

Since 1983, TTFADV has expanded the number of programs serving battered women and their children from five to forty-eight and has increased state and federal family violence funding to domestic violence programs. TTFADV established the Woman's Resource Center on Domestic Violence and Sexual Assault and has advocated for more than thirty pieces of legislation improving safety for domestic violence victims.

VERMONT NETWORK AGAINST DOMESTIC VIOLENCE AND SEXUAL ASSAULT

The Vermont Network Against Domestic Violence and Sexual Assault is a statewide coalition of direct service programs serving victims of domestic and sexual

violence in the state of Vermont. In addition to supporting the work of the direct service programs, the Network's role is to educate the community about domestic and sexual violence, to work for relevant legislation on the state and national levels, and to provide advocacy both on behalf of victims and the work of member organizations.

WASHINGTON STATE COALITION AGAINST DOMESTIC VIOLENCE

The Washington State Coalition Against Domestic Violence is a statewide non-profit agency committed to ending domestic violence through advocacy and action for social change. Founded in 1990, the Coalition has a membership of 150 domestic violence programs and supportive individuals dedicated to eliminating domestic violence. It has assisted in the development of public policy and laws which are responsive to the health, economic, emotional and physical safety needs of battered women and their children.

WEST VIRGINIA COALITION AGAINST DOMESTIC VIOLENCE

The West Virginia Coalition Against Domestic Violence (WVCADV) is a non-profit organization founded in the late 1970s and incorporated in the state of West Virginia in July 1981. WVCADV is a network of thirteen direct services programs, their outreach offices, and a Central Service Office. The mission of WVCADV is to end violence in the lives of women, children, and men within the family or home. WVCADV programs provide services in all fifty-five counties of the state.

WOMEN EMPLOYED

Women Employed is a national association of working women based in Chicago, with a membership of 2,000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Through its direct service programs and advocacy work, Women Employed has assisted thousands of welfare recipients and survivors of domestic violence.

WOMEN'S LAW PROJECT

The Women's Law Project is a non-profit women's legal advocacy organization based in Philadelphia. Since its founding in 1974, the Law Project has devoted itself to empowering and protecting battered women and their children. It currently is co-counsel to the plaintiff class in *Maldonado v. Houstoun*, 157 F.3d 179 (3d Cir. 1998), challenging Pennsylvania's durational residency requirement for cash assistance. The Law Project authored *Family Violence and the Child Custody Process: A Legal Guide for Protecting Children* (1996), and participates on the Pennsylvania Department of Public Welfare's Domestic Violence/TANF Task Force, which is charged with developing recommendations for effectively implementing the Family Violence Option. The Law Project has assisted many battered women who have been unable to avail themselves of the Family Violence Option's protections because they have been unable to provide sufficient written documentation of the abuse or because their caseworkers have been unaware of or unwilling to apply the Option.

WYOMING COALITION AGAINST DOMESTIC VIOLENCE AND SEXUAL ASSAULT

The Wyoming Coalition Against Domestic Violence and Sexual Assault (WCADVSA) is a non-profit network of Wyoming's domestic violence/sexual assault programs. WCADVSA's mission is to end violence and seek justice through social change utilizing education, political action, and empowerment of victims.

YWCA OF SAN DIEGO COUNTY – DOMESTIC VIOLENCE SERVICES

For over twenty years, the YWCA of San Diego County has provided the community with comprehensive services for domestic violence victims and their children. Its hotline provides twenty-four hour emergency assistance, emotional support, resource information and referrals. The Counseling Center specializes in support groups for battered women and treatment of batterers. The Legal Advocacy Program promotes the elimination of domestic violence by offering counseling, legal information and referrals for women in crisis, assistance in obtaining Domestic Violence Restraining Orders, custody orders and divorces, support escorts for court hearings, and bilingual services and translations. The PASSAGES program is a continuum of long-term residential and supportive services to assist battered women and their children. PASSAGES includes, among other services, a confidential shelter and a ninety-day residential program.

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In The

Supreme Court of the United States

October Term, 1998

ELOISE ANDERSON, Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; and CRAIG L. BROWN, Director, California Department of Finance,

Petitioners,

v.

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF SOCIAL SCIENTISTS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are social scientists and other scholars in the fields of law, economics, history, social work, women's studies, and public policy. They are professors and researchers at leading institutions throughout the United States. They have researched, written, and taught in all areas of poverty studies, and have specialized in social welfare policy. In particular, many of the *amici* have studied the changes to the welfare system initiated by passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. §§ 601 *et seq.* (Supp. II 1996), and have evaluated the empirical support -- or lack thereof -- for these changes. Because of this expertise, *amici* here provide the Court with their understanding of the issues raised in this case. A complete list of *amici* is set forth in the Appendix.

STATEMENT OF THE CASE

In 1992, California amended its welfare regulations to limit the amount of benefits that a new resident in the state could receive during her first twelve months of residency. Specifically, the law limited a family's benefits during the first twelve months of residency to an amount not to exceed "the maximum aid payment that would have been received by that family from the state of prior residence." *Cal. Wel. &*

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[1] All parties have consented to the appearance of the social scientists in this matter, and letters of consent have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici curiae*, or their counsel, have made a monetary contribution to the preparation or submission of this brief.

Inst. Code § 11450.03(a). In a decision holding that this durational residency requirement was unconstitutional, the district court reviewed the legislative history of the law and found that its purpose appeared to be "to deter migration by poor people into the State." *Green v. Anderson*, 811 F. Supp. 516, 521, n. 14 (E.D. Cal. 1993), *aff'd*, 26 F.3d 95 (9th Cir. 1994), *cert. granted*, 513 U.S. 922 (1994), *and vacated as unripe*, 513 U.S. 557 (1995). The law was not implemented due to the subsequent vacatur of the necessary federal approval.

Four years later, Congress radically altered all federally sponsored welfare programs. The old system, Aid to Families with Dependent Children ("AFDC"), was replaced with a new program, Temporary Assistance for Needy Families ("TANF"). Under the TANF structure, states are given block grants to help fund their welfare programs, which are to be developed on a state-by-state basis. The new welfare law permits a state operating a TANF program to "apply to a family the rules (including benefit amounts) of the [TANF] program . . . of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months." 42 U.S.C. § 604(c) (Supp. II 1996). The legislative history indicates that this provision was enacted due to a belief that "some families move across State lines to maximize welfare benefits" and that "States that want to pay higher benefits should not be deterred from doing so by the fear that they will attract large numbers of recipients from bordering States." H.R. Rep. No. 104-651, at 1337 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2396.

Given this development, in October 1996, California submitted a TANF plan to the United States Department of Health and Human Services which included such a durational residency requirement. *Roe v. Anderson*, 966 F. Supp. 977,

979 (E.D. Cal. 1997), *aff'd*, 134 F.3d 1400 (9th Cir. 1998), *cert. granted*, 119 S.Ct. 31 (1998). The plan was approved and went into effect on April 1, 1997. *Id.* at 979-80. This restriction was struck down as unconstitutional by the United States District Court and the United States Court of Appeals for the Ninth Circuit, but petitioners now ask the Court to reverse the lower courts and uphold the California statute limiting the level of welfare benefits for new state residents.

SUMMARY OF ARGUMENT

The California durational residency statute, *Cal. Wel. & Inst. Code* § 11450.03 ("the statute"), provides that families eligible for welfare assistance who have resided in the state for less than twelve consecutive months immediately before applying for aid cannot receive assistance in an amount higher than the maximum aid that that family would have received from the state of prior residence. Under the statute, families that have lived in California for at least twelve months receive an amount that the state deems necessary for subsistence; families coming from a state with higher benefits receive the same level. Families coming from a state with lower benefits receive that lower level despite the fact that the members of these families are bona fide residents of California and are identical to similarly situated persons who have resided in California for at least twelve months.

For example, under the statute, in 1997, the monthly benefit for a family of three that resided in California for at least twelve months would have been $565; for a family of three arriving from Arizona within the prior twelve months, $347; from New Mexico, $389; Nevada, $348; Texas, $188; and Mississippi, $120. H.R. Doc. No. 105-7, Table 7-9, at

419-20 (1998), *1998 Green Book: Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means* ("*1998 Green Book*"). When one considers the cost of living in California for basic necessities for a single mother and two minor children, these reductions -- ranging from a low of 31% to a high of 78% of California's benefits-- are significant.

This durational residency restriction for receipt of welfare benefits is based on a theory of "welfare magnets" -- that welfare-eligible families move to a new state due to the enticement of higher welfare benefits, and that fewer poor people will move to a state if they are not immediately eligible for the higher level of benefits. This statute is unconstitutional because it is impermissibly intended to eliminate migration and because there is no compelling state interest in drawing a distinction in the level of welfare payments between California state residents who have lived in the state for more than twelve months and those who have lived there for less than twelve months. *Attorney General v. Soto-Lopez*, 476 U.S. 898, 911 (1986); *Shapiro v. Thompson*, 394 U.S. 618, 632-33 (1969). The statute is based upon insupportable myths, rather than "reasonable empirical judgments," which are required under even a rational basis test. *Mathews v. Lucas*, 427 U.S. 495, 510 (1976).

The stated rationale for the statute is based upon a series of assumptions which are empirically false. First, most adults who receive welfare benefits are, in fact, connected to the labor market: they receive welfare for relatively short periods to cover discrete emergencies and it is therefore unlikely that they would migrate to California in search of welfare benefits. Furthermore, the most recent empirical studies find no support for the welfare magnet thesis, and instead demonstrate that poor families that migrate are no

more likely to begin receiving welfare benefits than are poor families who have lived in the state for longer periods of time. Finally, when one takes into account the differences in costs of living, the benefit differentials between the states are not sufficiently substantial to encourage migration. For all of these reasons, the fear of creating a welfare magnet provides neither a compelling state interest nor a rational basis for providing lower welfare benefits to newer state residents than to longer-term residents.

ARGUMENT

I.

MOST ADULT WELFARE RECIPIENTS ARE LINKED TO THE LABOR MARKET AND WOULD NOT BE MOTIVATED TO MOVE BY A HIGHER WELFARE BENEFIT LEVEL.

A. Most Welfare Recipients Cycle On and Off Assistance for Short Periods to Assist With Discrete Emergencies and This Cycle is Not Compatible with the Welfare Magnet Thesis.

The prevailing myth about welfare is that recipients are primarily young black women who have lots of children, are long-term dependents, and pass this dependency from generation to generation. *See* Lucie E. White, *No Exit: Rethinking "Welfare Dependency" From a Different Ground*, 81 Geo. L. J. 1961, 1966-70 (1993). These generalizations are demonstrably false. In fact, the welfare rolls are mixed racially and the average welfare family is about the same size or smaller than is the average non-welfare family. Joel F. Handler & Yeheskel Hasenfeld, *We the Poor People* 45 (1997). In 1995, the average size of the welfare family was 2.8; 72.8% of AFDC families consisted

of one or two children, and 88.3%, of three or fewer children. *1998 Green Book*, Table 7-19, at 440.

Long-term dependency is also a myth. Contrary to the popular view of long-term dependency, the reality is of people cycling on and off welfare. Handler & Hasenfeld at 46. While long-term reliance on welfare may be suggested by an analysis that looks only at one point in time and which includes long-term recipients, most recipients stay on welfare during each episode for a relatively short time. *1998 Green Book* at 532. More than half (55.8%) of welfare episodes end within 12 months, 70% within 24 months, and almost 83% within 4 years. *Id.* at 531-32 and Table 7-52, at 534. Counting multiple spells, 30% of recipients are on welfare less than two years, 50% less than four years, and only about 15% stay on welfare continuously for five years. Mark Greenberg, *Beyond Stereotypes: What State AFDC Studies on Length of Stay Tell Us About Welfare as a "Way of Life"* (1993).

Although people leave the welfare rolls for a variety of reasons, the most significant single reason is employment. Kathleen Harris, *Work and Welfare Among Single Mothers in Poverty*, 99 Am. J. Soc. 317 (1993). In fact, most welfare recipients combine work with welfare, if for no other reason than that they cannot survive on welfare alone. Kathryn Edin & Laura Lein, *Making Ends Meet: How Single Mothers Survive Welfare and Low-Wage Work* (1997). *See also* Kathryn Edin & Christopher Jencks, *Reforming Welfare*, in Christopher Jencks, *Rethinking Social Policy* 204-235 (1992).

The principal reason why these individuals return to welfare lies in the characteristics of the low-wage labor market -- jobs disappear, wages are low, there are often no

benefits or benefits for only the employee, or there are problems with transportation, child care, and health care. Handler & Hasenfeld at 48-53. These women[2] prefer to work but have low levels of education and the positions available to them are as cashiers, nursing aids, food service personnel, janitors, maids, and machine operators. *Id.* at 49-50. The pay is low, typically minimum wage, and most families are worse off if they rely on work only. *Id. See also* Edin & Lein at 127-136. When jobs disappear or there are child care, transportation or other difficulties, these women often turn to welfare, primarily because most of these poor women are not eligible for Unemployment Insurance. *See* Sharon Dietrich *et al.*, *Work Reform: The Other Side of Welfare Reform*, 9 Stan. L. & Pol'y Rev. 53, 61-63 (1998). *See also* Martin Malin, *Unemployment Compensation in a Time of Increasing Work-Family Conflicts*, 29 U. Mich. J. L. Ref. 131 (Fall 1995 & Winter 1996). Still, despite these odds, most welfare recipients work, and eventually exit welfare permanently via a job. Handler & Hasenfeld at 51-53.

The facts about welfare recipients and their connection to the labor market are completely inconsistent with the view that welfare benefits provide a significant "incentive" for people to move to high benefit states. Rather, the evidence of recipients leaving welfare or cycling on and off welfare tends more strongly to show that welfare recipients are in fact motivated to seek work and that they treat welfare not as an incentive, but rather as a form of unemployment insurance.

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[2] Welfare recipients are referred to as women because women with children comprise 93% of households receiving assistance. *1998 Green Book, supra. See also* Handler & Hasenfeld at 44.

B. Adults in the Welfare Population Are Motivated to Move to Find Work or Support From Family and Friends.

Several studies show that the poor migrate primarily to be close to family or friends or for better job opportunities, and with little knowledge of welfare rules and benefits. Paul Voss *et al.*, *Interstate Migration and Public Welfare: The Migration Decision Making of a Low Income Population*, in *Community, Society and Migration* (P.C. Jobes *et al.* eds., 1993); Carol Stack, *Call to Home: African-Americans Reclaim the Rural South* (1996). One recent study of individuals' choices of location and decisions to change location did not find a significant relationship between welfare benefits and decisions to move. Carole Roan Gresenz, *An Empirical Investigation of the Role of AFDC Benefits in Location Choice* (Labor and Populations Working Paper Series No. 97-05, 1997). The study did find, however, that decisions to move or not to move were affected by labor market considerations and that individuals were less likely to move to states with higher unemployment rates. *Id.* According to a comprehensive study of domestic net migration in California from 1985 to 1994, there is a "strong association between unemployment rates and domestic migration to California" such that migration to California increases substantially when the unemployment rates in the state decline relative to unemployment rates in the nation as a whole. Hans P. Johnson & Richard Lovelady, *Migration Between California and Other States: 1985-1994* at 13 (Cal. Research Bureau of Cal. State Library and Demographic Unit of Cal. Dep't of Finance, 1995).

Poor families migrate for reasons of family, friends, and job opportunities because even in the high benefit states,

welfare recipients cannot survive on welfare alone. Benefits, including food stamps, do not provide minimally adequate subsistence and cover less than two-thirds of the average recipient family's expenses. Sanford Schram & Joe Soss, *The Real Value of Welfare: Why Poor Families Do Not Migrate*, Pol. & Soc'y, at 18 (forthcoming March 1999) (manuscript on file with authors). Recipients rely on support from relatives and friends, as well as jobs, in addition to welfare. Kathryn Edin & Laura Lein, *Making Ends Meet: How Single Mothers Survive Welfare and Low-Wage Work* (1997). Another reason that poor families do not cross state borders in search of welfare is that over the past several years, there have been great changes in state welfare eligibility rules and disqualifications which have created considerable uncertainty. A recipient family can lose benefits entirely by making the wrong decision. Poor families are more likely to choose the security of family and friends than to gamble on uncertain higher welfare benefits. Schram & Soss at 24.

In sum, the overwhelming majority of welfare mothers have small families, are connected to the labor market, use welfare to support their work efforts, and rather than making welfare a "way of life," eventually manage to leave welfare after a relatively short time. They move to new locations to find work, as well as support from friends and families, and not to find higher welfare benefits.

II.

THE THEORY OF WELFARE MIGRATION BASED ON HIGHER BENEFITS IS A MYTH.

Recent empirical studies disprove the welfare magnet myth. Social scientists have utilized large data pools to evaluate and compare the movement patterns of welfare-eligible and non-eligible families. They have compared these patterns to welfare benefit levels and cost-of-living variables, especially housing costs. Based on these comprehensive studies, leading scholars have concluded that there is no empirical support for the theory of welfare migration, and that past studies supporting the theory were flawed in their methodology. *See Roe v. Anderson*, 966 F. Supp. at 982 (*citing* Handler Decl. ¶ 10).

Large-scale studies show that welfare recipients are no more likely, or perhaps even less likely, to relocate to a higher benefit state than non-recipients. For example, Schram and his colleagues utilized the Public Use Micro-data Set of the 1990 United States Census for the contiguous forty-eight states and Washington, D.C., to track a large number of out-of-state movers over a five-year period. Sanford Schram *et al.*, *Without Cause or Effect: Reconsidering Welfare Migration as a Policy Problem*, 42 Am. J. Pol. Sci. 210 (1998).[3] The authors analyzed a large sample of single mothers with children under the age of 18, and concluded that about 268,000 single poor mothers

[3] This data set provides a larger representative sample for a longer period of time than any of the other major studies of welfare migration. The data set also provides information on personal, family, and household characteristics, including the receipt of public assistance. Schram *et al.* at 220.

migrated over the five-year period. This amounts to an average of about 53,000 welfare migrants per year, which is approximately 3% of all poor single mothers. *Id.* at 221. They found that the rate of movement was nearly identical for these single mothers, regardless of whether their annual income was above or below the poverty line. Thus, even though poor families were presumably more likely to be welfare recipients, these poor families were not any more likely to move than their non-poor counterparts. *Id.* at 220.

Next, the authors compared the characteristics of migrants with non-migrants. They found that migrants had slightly higher earnings and a slightly lower likelihood of receiving public assistance than non-migrants. Comparing average incomes and average benefit levels, they found that "migrants are not more likely to come from low benefit states." *Id.* at 221. As with previous studies, the authors found no relationship between benefit levels and poor single mothers who migrate: "[P]oor single mothers living in high benefit states in 1990 were no more likely to have moved in since 1985 than poor single mothers living in low benefit states." *Id.* at 222.

If poor single mothers migrate to higher benefit states, then their rate of public assistance receipt in those states should be higher than that of poor residents who have lived in the state for more than twelve months, but there is no such relationship. Regardless of benefit level, "migrants and non-migrants tend to receive assistance at about the same rate." *Id.* at 224. Schram and his colleagues conclude: "[T]he annual level of welfare migration for the 1985-90 period, and probably for other periods of recent years, is quite small . . . [and] the migration routes of poor single mothers with children are not associated with higher welfare benefits." *Id.*

at 227. Not only is welfare migration relatively infrequent, but more importantly, it is not tied to state benefit levels.

Similarly, Philip Levine and David Zimmerman analyzed annual demographic data from the National Longitudinal Study of Youth, which collected approximately 19,000 data observations on 14 to 21 year-olds each year from 1979 to 1992. Philip Levine & David Zimmerman, *An Empirical Analysis of the Welfare Magnet Debate Using the NLSY* (Institute for Research on Poverty Disc. Paper No. 1098-96, 1996). The researchers found that 3.8% of the AFDC-eligible population moved from one state to another, and only 1.8% moved from a state offering lower AFDC benefits to a state offering higher AFDC benefits. *Id.* at 21. In contrast, of the non-AFDC eligible population, 6.8% moved to a different state, 3.4% from a lower to a higher benefit state. *Id.* Thus, of the people who moved from one state to another, non-AFDC eligible people were more likely to move to higher benefit states than AFDC-eligible people, exactly the opposite of the correlation that would be predicted by a "welfare magnet" effect. Furthermore, less than half of the AFDC-eligible population that moved to a higher benefit state actually received welfare benefits within the first two years of their move. *Id.* The authors conclude that there is "little evidence that those women most likely to be candidates for AFDC move in a pattern consistent with the welfare-magnet hypothesis." *Id.* at 32.

Other scholars using large-scale data-sets on individuals, such as the County-to-County Migration Flow Files, also found no significant welfare migration. One social scientist examined the net migration of families likely to qualify for AFDC across contiguous border counties where a state offers a grant that is at least $85 higher. James R. Walker, *Migration Among Low-Income Households:*

Helping the Witch Doctors Reach Consensus (Institute for Research on Poverty Disc. Paper No. 1031-94, 1994). He found as much out-migration to the lower benefit border county as in-migration to the higher benefit county. *Id.* Researchers using the Current Population Survey, 1982-84, and 1986-88, also found no association between the proportion of the welfare population moving to another state and the difference in state benefits. Russell L. Hanson & John T. Hartman, *Do Welfare Magnets Attract* (Institute for Research on Poverty Disc. Paper No. 1028-94, 1994). *See also Roe v. Anderson*, 966 F. Supp. at 982 (*citing* Hartman Decl. ¶ 49).

The principal study used by states to support their reliance upon the magnet theory as an explanation of their policies is by Peterson and Rom. Paul E. Peterson & Mark C. Rom, *Welfare Magnets: A New Case for a National Standard* (1990). Among the limitations of the Peterson and Rom study is its use of aggregate state-level data that does not directly measure migration. In addition, statistical analyses performed by states that purport to document the welfare magnet myth are flawed due to their assumption that welfare recipients are focused only upon obtaining higher benefits. Sanford Schram *et al.*, *Without Cause or Effect: Reconsidering Welfare Migration as a Policy Problem*, 42 Am. J. Pol. Sci. 210, 212 (1998). Such states estimate the proportion of the poverty or welfare population that has recently arrived and then emphasize the benefit differences that might attract migrants while de-emphasizing other factors -- better schools, safer neighborhoods, adequate public services, an escape from abusive family relationships -- which might well have been the true impetus for movement by the families; they thus discount the search for better opportunities so prevalent throughout American history. *Id.* at 212. Furthermore, most state studies estimate the

percentage of welfare recipients coming from another state (usually defined as not having resided within the state for the last five years) but fail to adjust those estimates for the percentage of the general population that similarly migrates. A finding that "one-fifth of the current welfare recipients are from out-of-state really does not tell us much about welfare migration, especially if one-fifth of the general population of the state is also from out-of-state." *Id.* at 214.

Thus, recent scholarly studies refute the magnet thesis. These studies show that poor families do not, in fact, migrate across state border to avail themselves of higher welfare benefits. In sum, the welfare magnet theory is a myth and does not provide either a compelling interest or a rational basis for any state policy regarding welfare benefits.

III.

BENEFIT LEVELS DO NOT CREATE AN INCENTIVE TO MIGRATE WHEN COST-OF-LIVING VARIABLES ARE CONSIDERED.

The magnet theory is predicated on the notion that there are incentive effects created by the difference in benefit levels. The theory assumes, therefore, the existence of such variation between the states. However, appropriate social science analysis of the level of AFDC benefits, both in nominal terms and adjusted for the cost-of-living, in the continental forty-eight states and Washington, D.C., reveals that "there is far less variation in the real value of benefits across the states than is often assumed, perhaps not much more than state variation in the cost-of-living, suggesting that the welfare migration story may in fact be lacking a strong causal agent." *Id.* at 217. When food stamp benefits are factored in, there is even less variation between the states.

Id. at 219. A new state resident in California who receives lower benefits than her non-migrant counterpart due to the lower benefit level in her prior state of residence will be forced to survive on a benefit amount that does not reflect the higher cost-of-living in her new home state.

When more refined measures of costs-of-living are utilized, differences in benefit levels virtually disappear. These refined analyses focus on the relative costs of those items upon which poor families spend the majority of their limited income, such as food and housing. Such analyses are necessary in order to understand the situation faced by poor families in California, where housing costs are higher than housing costs in all but four other states and the District of Columbia. *Fair Market Rents for the Section 8 Housing Assistance Payments Program -- Fiscal Year* 1999, 63 *Fed. Reg.* 52,858 (1998) (*to be codified at* 24 C.F.R. pt. 888). Furthermore, as of 1995, only 9% of California's AFDC families received housing assistance, as compared to the national average of 22.5%. U.S. Dep't of Health and Human Services, *Aid to Families with Dependent Children, Characteristics and Financial Circumstances of AFDC Recipients* at Table 4 (1995).

California's high housing costs have a significant effect on the welfare magnet thesis. For example, in 1996, the average amount of combined monthly benefits (i.e., AFDC and food stamps) provided by the states was $682.10. Sanford Schram & Joe Soss, *The Real Value of Welfare: Why Poor Families Do Not Migrate*, Pol. & Soc'y, Table 1, at 33 (forthcoming March 1999) (manuscript on file with authors). California offered $852.00 in combined benefits that year.[4]

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[4] These data are based on research in Schram & Soss, *The Real Value of Welfare, supra*, as applied to 1996 data for California on the level of

Thus, a recipient moving from a state offering "average" combined benefits would have received $169.90 more in California. However, the Schram and Soss analysis demonstrates that, across the nation, each additional dollar of benefits was associated with a gain of 62 cents in additional housing costs. This relationship suggests that the recipient who moved to California would have incurred additional housing costs of approximately $105.34 per month. Consequently, the average net gain from moving to California would have been only $64.56 per month, or $14.90 per week.[5]

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welfare benefits and average housing costs. Welfare benefit information was obtained from the 1996 Green Book. H.R. Rep. 104-14 (1996), *1996 Green Book: Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means.* Housing cost information for a two-bedroom apartment in California was obtained from the Fair Market Rent estimates developed by the United States Department of Housing and Urban Development. *Fair Market Rents for the Section 8 Housing Assistance Payments Program -- Fiscal Year 1996*, 61 *Fed. Reg.* 6,690 (1996) (*codified at* 24 C.F.R. pt. 888 (1996)).

[5] More recent figures for housing costs and welfare benefits demonstrate the continuation of this trend. According to the United States Department of Housing and Urban Development, the Fair Market Rent in 1999 for a one-bedroom apartment in California will be $622, and for a two-bedroom apartment, $780, based upon averages of metropolitan fair market rents weighted by the number of renter households in each area. Given the 1998 welfare benefit for a 3-person family in 1998 of $611 (not including food stamp benefits), these housing costs alone would consume 102% or 128%, respectively, of the welfare budget. *Fair Market Rents for the Section 8. Housing Assistance Payments Program -- Fiscal Year 1999, supra.* Urban Institute, *One Year After Welfare Reform: A Description of State Temporary Assistance for Needy Families (TANF) Decisions as of October 1997*, at Table 13 (1998) (as updated by the Center of Budget and Policy Priorities).

Amici acknowledge that there are analyses suggesting that benefit levels might encourage migration. *See, e.g.*, Peterson & Rom, *supra*. These studies, however, are deeply flawed in that they rely on an overall cost-of-living index rather than a measure of the cost of the market goods which most directly affect welfare recipients. Schram & Soss at 25. Specifically, their approach ignores the established fact that, compared to the general population, welfare recipients use a disproportionate amount of their welfare benefits (including food stamps) to cover food and housing costs.[6] *Id.* at 24-25. For example, "[i]n 1995, more than half of all poor renter households, regardless of welfare receipt, spent over 50 percent of their income for housing," and most welfare families do not receive housing subsidies. *Id.* at 26. Looking at housing costs alone (based on Fair Market Rent estimates created by the United States Department of Housing and Urban Development), Schram and Soss found, contrary to the magnet thesis, that housing costs vary much more across states than do welfare benefits and that the incentives to move based upon welfare benefits are therefore negligible when housing costs are considered in the equation. *Id.* at 26-30. Over all, a family's net gain in benefits in 1996 based on a move to California from a state with the average amount of combined benefits would have been $64.56 per month. *See supra* note 4. Given that the average welfare family's combined budget (packaging welfare with work, support from family and friends, etc.) is approximately $1,000 per month, Edin & Lein, *supra*, this amount seems "hardly a lucrative payoff for uprooting one's family and spending the resources needed to move to a new state." Schram & Soss at 28.

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[6] Even food stamps do not cover the full amount of food. Most families have to use part of the cash grant to cover food expenses. Schram & Soss at 25.

Social scientists have compared the maximum monthly AFDC/food stamp benefits for a family of three to rental costs of a two-bedroom apartment for Arizona, Nevada, and California to demonstrate the impact of the durational residency statute.[7] For 1996, the figures were as follows:

	Benefits	Rental Costs
Arizona	$660	$561
Nevada	$661	$618
California	$852	$855

Comparing 1993 figures with those from 1996, Schram found that housing costs increase faster than benefits. In 1996, the Arizona to California move would have translated into a 29.1% increase in benefits, but a 52.4% increase in housing costs. The Nevada to California move would have meant a 28.9% increase in benefits, but a 38.3% increase in housing costs. The average move from any another state to California would have lead to a 24.9% increase in benefits, but a 48.1% increase in housing costs. In other words, moving to California often means getting higher housing costs more than it means getting higher benefits. Thus, when housing costs (as well as other costs) are considered, "the alleged cause of welfare migration offers a pitifully weak incentive for recipients. From this perspective, it should hardly be surprising that the behavior alleged in the welfare migration thesis is an exceedingly rare phenomenon. Put simply, the real value of welfare for recipients does not vary all that much across the states." Schram & Soss at 29.

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[7] *See supra* note 4.

Under the statute, new California residents will have to pay the average 48.1% extra in housing costs without the increase of 24.9% in benefits, while poor residents who have lived in California for at least twelve months will receive the higher level of benefits. New residents of the state who moved there to seek employment, to be close to family, or perhaps to escape an abusive relationship -- not for the higher welfare benefits -- will struggle to pay higher basic living costs without an appropriate level of support. These individuals will be forced to live in overcrowded and substandard housing, and will be at a disadvantage relative to other welfare recipients both in California and in their states of origin. *See Roe v. Anderson*, 966 F. Supp at 981 (*citing* Greenstein Decl. ¶¶ 28 and 29). In short, the state will be harming these women and children for allegedly migrating in search of higher benefits when there is no empirical support for that assumption.

CONCLUSION

It is clear that most welfare recipients are linked to the labor market, and that these individuals are motivated to move to find better job opportunities or to be near family and friends, rather than to seek higher welfare benefits. Leading scholars, utilizing recent, large data pools, conclude that there is no empirical support for the welfare migration thesis. The myth of welfare migration is further debunked when social scientists calculate the cost-of-living differences for those items upon which poor families spend the majority of their income, such as housing, as the differences in state welfare benefit levels are then rendered illusory.

The welfare migration thesis taps into deep-seated anxieties. It feeds into the stereotype of welfare recipients as self-seekers abusing the system. It serves as a justification

for state politicians to lower welfare benefits and to discriminate against outsiders. When the empirical evidence is examined, however, there is not only no compelling state interest but not even a rational basis for providing lower welfare benefits to poor single mothers and their children who migrate to the state and who, for a variety of reasons, find themselves just as much in need as similarly situated longer-term residents. The California residency rule will impose a severe financial burden on such a family, without proper state justification. Poor families should not be made to suffer in this way.

For these reasons, the Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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No. 98-97 (21)

Supreme Court, U.S.
FILED
DEC 8 199
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ELOISE ANDERSON, Director, California Department of Social Services, *et al.*,

Petitioners,

—v.—

BRENDA ROE and ANNA DOE, on behalf of themselves and all others similarly situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR WILLIAM COHEN, MICHAEL C. DORF, GERALD GUNTHER, RODERICK M. HILLS, JR., PAUL KAHN, KENNETH L. KARST, SETH KREIMER, DOUGLAS LAYCOCK, JEFFERY LEHMAN, FRANK MICHELMAN, RICHARD PILDES, DONALD H. REGAN, STEVEN SHRIFFRIN, GARY SWIMSON, AND CHRISTINA B.WHITMAN, *AMICI CURIAE, SUPPORTING RESPONDENTS*

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43 pp

QUESTION PRESENTED

Whether California's statute requiring bona fide state residents who have resided less than one year in California to receive only the welfare benefits that they would have received in their former state of residence violates Article IV, section 2's Privileges and Immunities Clause or the Fourteenth Amendment.

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AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici are law professors, identified in an addendum below, who, with the consent of the parties, hope to address more directly than the parties the ingredients of our complex federal structure that we believe are significantly implicated by state laws imposing length of residence restrictions. From our perspective this case is primarily about intrastate equality irrespective of one's former non-residency in the state, which is implicit in the structure of national and state citizenship and reflected textually in the Privileges and Immunities Clause of Article IV, section 2 and the Citizenship Clause of the Fourteenth Amendment. That is a perspective we hope the Court will find informative.

SUMMARY OF ARGUMENT

The Constitution attempts a remarkable feat: it creates a national citizenry with nationally recognized rights while simultaneously respecting the principle of federalism. To reconcile these two goals, the Constitution relies on a simple but powerful principle — the principle that, while states have broad discretion to choose their policies, states may not choose their citizens. Instead, every state must allow all national citizens to settle within the state on equal terms with existing residents. This principle is embodied not only in the Privileges and Immunities Clause of Article IV, section 2 and also the Citizenship Clause of the Fourteenth Amendment, but also in the structure of our federalism: the principle of equal treatment of new and old residents insures that national citizens can take advantage of the liberty-protecting characteristic of federalism — the opportunity to flee oppressive states and migrate to states with more congenial laws.

This Court has consistently enforced a strong presumption against classifications that burden new residents

based on length of residency, because such discrimination violates the principle that national citizens may establish a home within any state free from discrimination in favor of existing residents. In particular, this Court has allowed durational residency requirements only when there is a genuine danger that transient migrants will enter the state with the purpose of grabbing a "portable" good provided by the state (*e.g.*, a divorce decree or university diploma) and then immediately leave the state with the benefit in hand.

California's residency requirement for welfare benefits strikes at the heart of these principles. There is no reason to believe that welfare recipients lack a genuine intent to reside indefinitely in California. Moreover, this discrimination against bona fide residents of the state cannot be justified by a governmental interest in avoiding a "race to the bottom" in welfare benefits, not only because such a defense is foreclosed by this Court's precedents, but also because such a justification, if accepted by this Court, would open the door to a vast array of classifications designed to discourage the immigration of indigent citizens. California's residency requirement also cannot be justified by Congress' authorization in 42 U.S.C. § 604(c), because Congress lacks the power to burden the individual rights of citizens to settle in a new state on equal terms with old residents.

ARGUMENT

I. THE CONSTITUTIONAL REQUIREMENTS OF INTRASTATE AND INTERSTATE EQUALITY OF NATIONAL CITIZENS PRESUMPTIVELY FORBID STATE LAWS THAT CLASSIFY BONA FIDE RESIDENTS BY LENGTH OF RESIDENCY.

As its framers recognized, one central purpose of the United States Constitution is that it attempts to reconcile the two potentially contradictory goals of national union and federalism.

See THE FEDERALIST No. 39, at 246 (James Madison) (Clinton Rossiter ed. 1961) ("The proposed Constitution is ... neither a national nor a federal Constitution but a composition of both"). The Constitution creates "a more perfect union" by establishing a national citizenry protected by national rights. At the same time, the Constitution also creates a federal regime in which the people of each state governments have substantial autonomy to govern themselves. The fundamental challenge facing any court attempting to construe this Constitution, therefore, is to preserve national union and federalism simultaneously so that the United States remains "an indestructible Union, composed of indestructible States." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869).

The concept of equal state citizenship, irrespective of the former geographic residence of the citizen, is one of the Constitution's central mechanisms — perhaps *the* central mechanism — for reconciling national citizenship with federalism. According to this fundamental concept, state governments enjoy broad discretion to choose how they wish to govern their citizens. They are, however, required to respect the right of each citizen of the United States "to become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State." *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 80 (1873). As Justice O'Connor has noted, no state can "force[ ] non-residents settling in the State to accept a status inferior to that of oldtimers." *Zobel v. Williams*, 457 U.S. 55, 74 (1982). *Zobel*, at 74 (O'Connor, J., concurring). States have broad discretion to choose their tax and regulatory policies but no discretion to choose their members.

Although this Court has emphasized the 14th Amendment as the textual source of this presumption against discrimination based on former geographic residence, the presumption has its earliest embodiment in other textual provisions or constitutional doctrines, including the privileges

and immunities clause of Article IV, section 2[1]. In particular, as Justice Story noted, the Privileges and Immunities Clause of Article IV, section 2 "confer[red] on [each state citizen] a general citizenship."[2] From the outset, as reflected in Justice Bushrod Washington's opinion in *Corfield v. Coryell*, it was understood that one of the incidents of such citizenship was "[t]he right of a citizen of one state to pass through, *or reside in* any other state, for purposes of trade, agriculture, professional pursuits, or otherwise."[3] In other words, Article IV did not merely protect the sojourner's right to journey through a state but also the right of a newly arrived citizen to establish their residence in a state on a basis of equality.[4]

But the antebellum experience of the United States suggested that Article IV's Privileges and Immunities Clause was not sufficient to prevent state discrimination against newly arrived citizens. Prior to the Civil War, Southern states were notorious for their interference with interstate migration, excluding free Black citizens and abolitionists from their territory

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[1] *See, e.g., Zobel v. Williams*, 457 U.S. 55 (1982); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869); *United States v. Wheeler*, 254 U.S. 281 (1920); *Corfield v. Coryell*, 6 Fed. Cas. 546, 552 (C.C.E.D. Pa. 1823) (Case No. 3,230) (Washington, J.).

[2] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 3:1800 (1833).

[3] *Corfield*, 6 Fed. Cas. at 551 (emphasis added).

[4] *See* Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, The Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. Rev. 451, 501 (1992); Jonathan D. Varat, *Economic Integration and Interregional Migration in the United States Federal System*, in Comparative Constitutional Federalism: Europe and America 31 (Greenwood Press 1990).

even when it was well-understood that such exclusion interfered with the comity owed to Northern states under Article IV, section 2, or the dormant commerce power of Congress under Article I, section 8.[5] It was widely acknowledged that these exclusions would be unconstitutional if free Blacks were "citizens of each State" within the meaning of Article IV, section 2. Chief Justice Taney rejected the possibility of state citizenship for free Blacks under Article IV, section 2 in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), precisely because he assumed that state citizenship "would give [free Blacks] the right to enter every other State whenever they pleased," a conclusion that he found unacceptable. *Id.* at 417.

The citizenship clause of the Fourteenth Amendment was intended by the framers to overrule *Dred Scott*. *See, e.g., Sugarman v. Dougall*, 413 U.S. 634, 652 (1973) (Rehnquist, J., dissenting). More fundamentally, the framers' experience of the Slave Power's attacks on national citizenship and free interstate migration convinced the framers that states ought to be barred from selecting who could qualify for state citizenship: a central purpose of section 1 of the Fourteenth Amendment was to

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[5] For instance, southern states imprisoned free Black seamen who entered Southern ports with their ships, even in the teeth of Justice Johnson's decision in *Elkison v. Deliesseline*, 8 Fed. Cas. 493 (C.C.D.S.C. 1823) striking down such restrictions on free movement of both free Black Northern citizens and foreign seamen as encroachments of Congress' power to regulate international commerce. For an account of the Negro Seamen's Acts, see Paul Finkelman, *States' Rights North and South in Antebellum America*, in AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 130-33 (Kermit Hall & James W. Ely, Jr. eds., 1989). For an account of Southern state courts' rejection of free Blacks' claims to freedom under Northern liberty laws, see PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY ch. 7 (Chapel Hill, N.C., 1981).

prevent discrimination based on a citizen's state of origin.[6] The Citizenship Clauses, therefore, served as "a new constitutional confirmation" of the Privileges and Immunities Clause of Article IV, section 2,[7] guaranteeing to all national citizens (in Senator

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[6] Representative John Bingham, for instance, argued that the Constitution had failed to secure equal protection of the laws for "white men as well as black men," noting that, before the Civil War, "it was entirely unsafe for a citizen of Massachusetts ... to be found anywhere on the streets of Charleston...." Bingham was referring to the notorious incident in which Samuel Hoar, a Massachusetts abolitionist, was driven out of Charleston by a mob with the connivance of the state government when he attempted to speak against the state's Negro Seamen Act. According to Bingham, the concept of equal protection was intended to prevent such discrimination based on state citizenship. *See* EARL MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869, at 53-54 (1990). This view was echoed by Senator Lyman Trumbull and Representative James F. Wilson, both of whom were central figures in the passage of the Fourteenth Amendment. *See* MALTZ, *supra* at 64-65.

[7] JACOBUS TENBROEK, EQUAL UNDER LAW 232 (1965) ("The comity clause ... was the particular provision of the existing Constitution, most speakers agreed, the systematic violation of which had made necessary a new constitutional confirmation"). Representative Jacob Howard's views on this question are particularly instructive, as he was the official spokesman for the Joint Committee on Reconstruction on the meaning of the Fourteenth Amendment. According to Howard, the great object of the Fourteenth Amendment was to insure that the states respected the principles of comity contained in Article IV, section 2 not only for citizens of other states but also citizens of their own state. See MALTZ, supra at 97-98. To define the privileges and immunities protected by the Fourteenth Amendment, Howard referred to Justice

(continued...)

Lyman Trumbull's words) the right "to go into any State of the Union and to reside there."[8] The Court in *Slaughterhouse*, therefore, was on solid historical ground when it asserted that "a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that state." 83 U.S. (16 Wall.) 36, 80 (1873).

In short, both the Fourteenth Amendment's Citizenship Clause and Article IV, section 2 were historically understood to protect national citizens' rights to migrate freely throughout the United States on terms of equality with other state citizens. Moreover, these textual and historical foundations for the right to equal state citizenship are rooted in the structural imperative to reconcile national citizenship with federalism. It is easy to see why such a presumption against geographic-based discrimination fosters national union.[9] But the ingenuity of the principle against geographic-based discrimination is that it protects national unity while simultaneously advancing the liberty-promoting values of

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[7](...continued)
Bushrod Washington's recital of rights in *Corfield v. Coryell.* MALTZ, supra at 109. As noted above, *Corfield*'s catalogue of rights included the right to establish a residence within a new state.

[8] Lyman Trumbull's remarks are reported at Cong. Globe, 39th Cong., 1st Sess. 1757 (1866). The Republican consensus on Article IV, section 2 is discussed in EARL MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869 at 55, 63-65, 97 (1990).

[9] As this Court has noted, "without some provision . . . removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privileges with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869).

federalism. This Court has noted that an important benefit of a "federalist structure of joint sovereigns" is to "make[] government more responsive by putting the States in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). For such competition to exist, each citizen must have "the right to establish residence in a new State. Just as our federal system permits the States to experiment with different social and economic programs, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), it allows the individual to settle in the State offering those programs best tailored to his or her tastes." *Zobel*, 457 U.S. 55, 76-77 (1982) (O'Connor, J., concurring in judgment).

The United States has a venerable tradition of protecting liberty through mobility: a wide variety of groups — religious dissidents, fugitive slaves, the freed men who fled then post-Reconstruction South,[10] and the indigent — have migrated within the United States to escape oppressive laws or living conditions,

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[10] Between 1877-1880, for instance, thousands of African-American known as the "Exodusters" responded to circulars and public meetings calling for an exodus to Kansas to escape from the racist terrorism and poverty of the South after Reconstruction ended. Southern whites, fearing the loss of cheap labor, often tried to halt the migration with violence. *See* NELL IRVINE PAINTER, EXODUSTERS: BLACK MIGRATION TO KANSAS AFTER RECONSTRUCTION (Norton, 1976). Throughout the post-Civil War 19th Century, African-Americans also migrated across state lines within the South to seek out better-paying jobs, assisted by immigration agents who located employers in other states and arranged railroad transportation. Again, state governments attempted to stop such migration by imposing prohibitively high licensing fees on such agents. *See* David Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 Tex. L. Rev. 781, 792-801 (1998).

often in the teeth of state resistance to such migration.[11] But this system of federalism presupposes that states cannot shut the doors to immigrants fleeing from impoverished or oppressive states. The presumption against durational residency requirements, therefore, limits state discretion but actually promotes the values of federalism that justify such discretion.

A. EVEN WITHOUT THE FOURTEENTH AMENDMENT, ARTICLE IV, SECTION 2'S PRIVILEGES AND IMMUNITIES CLAUSE PRESUMPTIVELY BARS STATES FROM DISCRIMINATING AGAINST BONA FIDE RESIDENTS WITH DURATIONAL RESIDENCY REQUIREMENTS.

Justice O'Connor has most recently explained why Article IV, section 2 bars discrimination against bona fide state residents based on the time of their immigration to the state. As Justice O'Connor notes, if Article IV, section 2 would bar a state from discriminating against non-residents who enter a state to work, hunt, or obtain medical services, then "[a] fortiori, the Privileges and Immunities Clause should protect the 'citizen of State A who ventures into State B' to settle there and establish a home." *Zobel*, 457 U.S. at 74 (O'Connor, J., concurring) (citations omitted). The privileges and immunities clause of Article IV, section 2, in short, provides that newcomers to a state cannot be treated differently *after* they establish residency within the state because of their prior status as a non-residents.

To be sure, the clause does not "profess to control the power of the State governments over the rights of its own citizens." *Zobel*, 457 U.S. 84, n. 3 (Rehnquist, J., dissenting) (quoting *Slaughter-House Cases*, 16 Wall. 36, 77 (1873)). But

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[11] *See* Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1503 (1987) ("The main reason oppression at the federal level is more dangerous is that it is more difficult to escape").

Justice O'Connor rightly notes that Article IV's Privileges and Immunities Clause has force against durational residency requirements that are applied against a state's own residents, because such state laws burden persons based on their past status as a non-resident of the state: in Justice O'Connor's words, such classifications burden newcomers because of their "former residential status." *See Zobel*, 457 U.S. at 75. For instance, the Alaskan law at issue in *Zobel* burdened the Zobels because they had remained in another state prior to 1959 instead of immigrating to Alaska. Such classifications burdening persons because of their former non-residential status are presumptively impermissible under Article IV, section 2, because Article IV's Privileges and Immunities Clause makes "noncitizenship or nonresidence an improper basis for locating a special burden." *Austin v. New Hampshire*, 420 U.S. 656, 661 (1975).

In sum, once one has established bona fide residency, one cannot be relegated to an inferior status because one did not arrive in the new state, or leave one's old state, soon enough to qualify as an especially privileged oldtimer.[12] Otherwise, any state government could easily evade the prohibition contained in Article IV's Privileges and Immunities Clause simply by delaying the imposition of discriminatory burdens against newly arrived non-residents until they had lived in the state long enough to establish bona fide residency.

B. THE FOURTEENTH AMENDMENT PRESUMPTIVELY PROHIBITS DISCRIMINATION AGAINST BONA FIDE RESIDENTS BASED ON LENGTH OF RESIDENCE.

If additional warrant is required to establish a presumption against state rules discriminating against bona fide residents based on the recency of their arrival in the state, then the Fourteenth Amendment provides such warrant. Three clauses

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[12] *See* Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 518-19 (1981).

of the 14th Amendment in particular impose on states a duty of impartiality toward recent immigrants who have become new state citizens. First, the earliest Fourteenth Amendment decisions of this Court recognize that the Fourteenth Amendment's privileges and immunities clause guarantees that "a citizen of the United States can, by his own volition, become a citizen of any State of the Union by a bona fide residence therein, *with the same rights as other citizens of that State*." *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 80 (1873) (emphasis added). The *Slaughterhouse* majority, in other words, recognized that the individual's right to settle within any state of the Union presupposed intrastate equality between newly arrived state citizens and the "other citizens of the state."

Second, this understanding of the Fourteenth Amendment is reenforced by the Fourteenth Amendment's Citizenship clause, which guarantees that national citizens are entitled to state citizenship in the state "wherein they reside." *See Zobel*, 457 U.S. at 69-70 (Brennan, J., concurring) ("[T]he citizenship Clause of the Fourteenth Amendment expressly equates citizenship only with simple residence. That Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence"). It follows that states may not "concede [new residents'] citizenship in name only while treating them as if they were still citizens of other states" by relegating those new residents to the legal regime in other states. William Cohen, "Discrimination Against New State Citizens: An Update," 11 *Constitutional Commentary* 73, 79 (1994).

Third, apart from the Citizenship and Privileges and Immunities Clauses of the 14th Amendment, this Court has repeatedly invoked the Equal Protection Clause to strike down classifications burdening new state citizens based on the recency of their migration to the state. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985);

Attorney Gen. of New York v. Soto-Lopez, 476 U.S. 898 (1986). These decisions sometimes invoke "strict scrutiny" and sometimes only "minimum rationality review," but a common principle animates all of these precedents: when state laws that consign new residents to a status inferior to long-time residents, there is a danger that the state is impermissibly attempting to deter non-residents from establishing a new home within the state. Such discrimination amounts to a *de facto* immigration policy, in violation of the structural principle that states may choose policies but not people.

C. THIS COURT HAS UPHELD DURATIONAL RESIDENCY REQUIREMENTS ONLY WHEN THEY SERVE THE PURPOSE OF INSURING THAT RECENT IMMIGRANTS TO A STATE ARE BONA FIDE RESIDENTS WITH AN INTENT TO ESTABLISH DOMICILE WITHIN THE STATE.

As this Court has well understood, "'appropriately defined and uniformly applied bona fide residenc[y] requirements'" are presumptively valid, *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 255 (1974)(quoting *Dunn v. Blumstein*, 405 U.S. 330, 342 n.13 (1972)), whereas other durational residency requirements are not. State autonomy in a federal system requires that states not be forced to bestow the fruits of its tax effort on the nation at large.[13] Implicit in legitimate state power to treat residents and non-residents differently is some power to define residency, but in a fashion that does not make a mockery of the presumptive constitutional invalidity of length of residence distinctions. With respect to most lengthy residence distinctions, this Court has refused to accept the claim that they were an appropriate measure of bona fide residence.

The two circumstances in which this Court has upheld lengthy residency requirements — in-state tuition and divorce

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[13] *See* Varat, *supra* note 12, at 519-30.

decrees — have involved state government programs that bestow "portable" benefits on newcomers. When the beneficiaries of a state-financed program can continue to reap the benefits of the program after they leave the state, there is a special risk that transient immigrants will take the portable benefit and run: they may enter the state with no genuine domiciliary intent, intending instead to leave as soon as he or she has stayed long enough to obtain some state-created asset such as a divorce decree or college education.

For instance, the Court's summary affirmance of a one-year residency requirement for lower in-state university in *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971), might best be explained by the high likelihood that college applicants might fake their domiciliary intent, attend a state university for a few years, and then leave the state with their diploma in hand. *See Vlandis v. Kline*, 412 U.S. 441, 453-54 (1973) (a state may "establish such reasonable criteria for in-state status as to make virtually certain that students *who are not, in fact, bona fide residents of the State*, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.") (emphasis added).

This Court's decision in *Sosna v. Iowa*, 419 U.S. 393 (1975), upholding a one-year durational residency requirement to qualify as a petitioner in a divorce action, can be explained on similar grounds, because, like college diplomas, divorce decrees have value for the immigrant even after he or she leaves the state. As the *Sosna* Court noted, the state had an interest in insuring that "those who seek a divorce from its courts *be genuinely attached to the State.*" *Id.* at 409 (emphasis added). Absent such special proof of genuine attachment, there is an obvious risk that the person seeking a decree will fake their domiciliary intent just long enough to get the decree and then leave with the state-created benefit.

Highlighting these features of *Sosna* indicates how most durational residency requirements — including the one at issue in this case — differ from the residency requirements for divorce decrees or in-state tuition at state universities that this Court has upheld. Unlike the recipient of a university diploma or divorce decree, the recipient of welfare benefits cannot continue to receive benefits from the state's expenditure of funds after he or she departs the state: as soon as the welfare beneficiary leaves, he or she is disqualified from receiving any further payments of benefits. It would, therefore, make little sense to worry that welfare beneficiaries might enter a state to receive welfare benefits without any genuine domiciliary intent to reside there indefinitely. Indeed, by invoking the fear of becoming a "welfare magnet" to justify this durational residency requirement, California appears to concede that respondents intend to reside indefinitely in California. *Green v. Anderson*, 811 F. Supp. 516, and 522 n. 14 (E.D. Cal. 1993), *aff'd*, 26 F.3d 95 (9th Cir. 1994), *vacated as unripe sub nom. Anderson v. Green*, 513 U.S. 557 (1995). Such a fear suggests that California is worried that indigent newcomers will *stay too long,* not that such newcomers will *leave too quickly.*

II. CALIFORNIA'S DURATIONAL RESIDENCY REQUIREMENT CANNOT BE JUSTIFIED BY A GOVERNMENTAL INTEREST IN AVERTING EITHER "DISTORTION" OF INTERSTATE MIGRATION OR A "RACE TO THE BOTTOM" IN WELFARE BENEFITS.

In light of the principles discussed above, California's durational requirement residency falls squarely within the presumption against distinctions based on residency contained in Article IV's Privileges and Immunities Clause and the Fourteenth Amendment. It discriminates on its face against bona fide residents of the state based on the recency of their arrival to the state for reasons unrelated to proof of bona fide residency in the state.

The amicus brief filed by the United States urges, however, that such facial discrimination against new residents based on recency of arrival in the state can be justified by "plainly legitimate" (U.S. Amicus at 20) and, indeed, "important" (U.S. Amicus at 26-27) governmental interests aside from proof of bona fide residency. These purposes are (1) avoiding "distorted" incentives for interstate migration by benefit recipients and (2) "mitigating any tendency toward a 'race to the bottom' in . . . benefit levels (U.S. Amicus at 20). Both of these interests boil down to the same essential concern -- the concern that, absent some sort of limit on interstate migration, "each State has some incentive to set its benefit level at or below the level selected by every other State, so as to avoid attracting an influx of benefit-eligible migrants." U.S. Amicus at 20.

Amici urge this Court to reject the United States' contention that these interests suffice to justify durational residency requirements. Such a theory disregards this Court's precedents, which expressly reject this view. But, more important, the United States' position, if accepted, would come close to gutting this Court's right-to-travel jurisprudence: there simply is no coherent, judicially manageable way to cabin these rationales for discriminating against new state residents.

This Court has steadfastly rejected the notion that durational residency requirements can be justified by a desire to deter non-residents from taking advantage of state spending programs. In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the appellant state governments argued that durational residency requirements "may be justified as a permissible state attempt to discourage those indigents who would enter the State solely to obtain larger benefits." *Id.* at 631. But this Court rejected such an argument, stating that

> "a State may no more try to fence out those indigents who seek higher benefits than it may try to fence out indigents generally. Implicit in

> any such distinction is the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among others factors, the level of a State's public assistance." *Id.* at 631-32.

Likewise, this Court in *Maricopa County* rejected Maricopa County's argument that it needed to use residency requirements to "sustain the political viability of its [medical subsidy] programs." Maricopa County argued that, unless they could deter indigent persons from using the county hospital, "the threat of an influx of indigents would discourage 'the development of modern and effective (public medical) facilities.'" *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 266 (1974). But the Court reiterated its holding in *Shapiro* that neither Congress nor the states could induce higher levels of spending for indigents by discriminating against recently arrived bona fide indigent state residents, noting that such a method of encouraging higher spending on social programs is analogous to the policy of "induc[ing] wider state participation in school construction" by authorizing racial segregation in schools. *Id.*

In short, *Maricopa* and *Shapiro* squarely reject the argument proffered by the United States that Congress can encourage "full and committed state participation" in welfare programs by authorizing discrimination against newly arrived indigent immigrants. Whatever the merit of the end — increased welfare spending — neither the states nor Congress could use the unconstitutional *means* of durational residency requirements to achieve that end. None of these precedents prevents Congress from dealing with the practical "race-to-the-bottom" problem. If Congress wants to encourage states to participate in the TANF

program, then it can offer the state governments sufficient funds to cover the risk that the state's program might attract a disproportionate number of indigent persons from other states. (Per-person grants are one but not the only way to structure such a program).

The United States' suggested justifications for durational residency requirements are not simply inconsistent with this Court's precedents. They are also impossible to cabin with any judicially manageable standards: to accept the United States' reasoning is to eviscerate this Court's right-to-travel jurisprudence by opening the door to a myriad of state laws discriminating against newcomers.

It is important to see that the justifications for durational residency requirements proffered by the United States would justify a vast array of discrimination against new state residents, far beyond the context of welfare. The reason is that welfare benefits are not the only state program at risk from a "race to the bottom." Rather, such a danger arises whenever a state enacts *any* program that benefits below-median income households or workers at the expense of taxpayers and regulated industry. Any such program will tend to raise the tax or regulatory burden on the industry and other households within the jurisdiction, which in theory might induce them to exit the jurisdiction to escape these regulatory or tax burdens. Likewise, such programs may theoretically tend to attract indigent persons interested in reaping the program's benefit. The result is that the state or local government may be discouraged from enacting social welfare programs by the prospect that its tax base will erode as the cost of the program increases.[14]

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[14] *See, e.g.*, PAUL PETERSON, THE PRICE OF FEDERALISM (1995); James A. Brander, *Economic Policy Formation in a Federal State: A Game Theoretic Approach*, in INTERGOVERNMENTAL RELATIONS

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Thus, if states or Congress can justify durational residency requirements by invoking the theoretical possibility of a "race to the bottom" from unconstrained interstate migration, then the door would be opened for such requirements in a broad array of government programs. For instance, it is well-known that states' incentives to enact minimum wage legislation might be dampened by the problem of a "race to the bottom": states with a high minimum wage may tend to drive out industry while they attract workers eager to gain the benefits of the wage.[15] Therefore, under the United States' reasoning, states ought to be permitted to provide workers who migrate to a new state only the minimum wage level in their former state for one year, until they qualify for their new state's minimum wage level. The same reasoning would justify durational residency requirements in workers' compensation, disability, and unemployment insurance: this Court has itself stated that states can be discouraged from enacting generous social insurance programs by the prospect of becoming a "magnet" for poorer households that will induce the exit of their taxpaying industries. *Steward Machine v. Davis*, 301 U.S. 548, 588 (1937) ("Many held back [from enacting unemployment insurance] through alarm lest, in laying such a toll

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[14](...continued)
33, 47-54, 60- 65 (Richard Simeon ed., 1985) (arguing that interjurisdictional competition in industrial policy results in net welfare cost which may be resolved by a central government or binding code of conduct); *See* ALICE M. RIVLIN, REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES, AND THE FEDERAL GOVERNMENT 122 (1992); Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 919 (1985) ("The mobility of capital and of persons may also deter state and local governments from providing adequate welfare and social services for the needy.").

[15] DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 76-77 (1991)

upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors or competitors"). The same argument obviously applies *mutatis mutandis* to state programs for affordable housing, funds for education of the socially disadvantaged, job training, community development, and a myriad of other programs that benefit below-median income households. In each case, the dynamic is the same: one can theoretically argue that states will be more willing to be generous in social spending if they can treat newly arrived residents as non-residents for one year or longer. The prescription proposed by the United States, therefore, ought to be the same as well: the states and Congress ought to have the power to deny equality of state citizenship and burden interstate travel in order to encourage states to boost their social welfare spending for oldtime residents.

In short, if this Court were to accept the justification for durational residency requirements offered by the United States, then the Court would work a sweeping change in its right-to-travel jurisprudence: it would a vast array of durational residency requirements. In Justice Cardozo's words used in an analogous context, "[t]his would be to eat up the rule under the guise of an exception " *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 523 (1935). This is precisely why this Court has refused to go down such a path and has consistently rejected the reasoning that the United States presents. *See Shapiro*, 394 U.S. at 633 (rejecting reasoning that would "logically permit" a vast array of discrimination against new residents).

The United States, however, argues that its proposed justifications for discrimination against new residents will not drastically disturb this Court's jurisprudence, because the United States' justification would not apply to "severe burdens" on the right to interstate migration that amount to a "penalty" on such migration. The United States distinguishes *Shapiro* from this case by noting that *Shapiro* involved a total denial of welfare benefits, whereas California's statute "only" relegates new

residents to the level of benefits offered in the migrant's old state. (Amicus at 25-26).

The difficulty with such a distinction between "severe" and "non-severe" burdens is that it is logically incoherent and judicially unmanageable. If states can legitimately exclude new residents from enjoying the benefits of the state's laws in order to encourage more generous spending on social programs, then why cannot a state impose a total exclusion from such programs? After all, indigent non-residents might be attracted by the higher welfare benefits in California, even if they have to wait for a year to get them. The United States might reply that a total exclusion would somehow be "too great" a deterrent on interstate migration. However, this Court has repeatedly stated that the actual empirical deterrent effect on migration is irrelevant in principle to the legal analysis of durational residency requirements. As this Court noted in *Maricopa*, "[a]n attempt to distinguish *Shapiro* by urging that a durational residence requirement for voter registration did not deter travel, was found to be a 'fundamental misunderstanding of the law' in [*Dunn v. Blumstein*]." *Maricopa* reiterated the holding of *Dunn* that "'*Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other 'right to travel' cases in this Court always relied on the presence of actual deterrence." *Maricopa*, 415 U.S. at 258-59 (quoting *Dunn*, at 339-40).

This refusal to base the right to interstate migration on the actual magnitude of deterrent effects makes eminent sense: reliance on speculations about the "severity" of a burden on a new resident would transform the Court's "right-to-travel" jurisprudence into an ad hoc and judicially unmanageable quagmire. All durational residency requirements, after all, will deter some interstate migration and will impose some burden on new residents. The United States can provide no principled criteria for explaining when a tolerable burden crosses some imaginary line to a "severe" burden, and no principled line looks possible. The sheer judicial unmanageability of the inquiry

proposed by the United States is a powerful reason to reject it: a nebulous "test" that rests on the "severity"of a burden undermines the predictability and judicial manageability of this Court's doctrine. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178-83 (1989); *Morrison v. Olson*, 487 U.S. 654, 733-34 (1988) (Scalia. J., dissenting) ("A government of laws means a government of rules" and deploring "ad hoc approach to constitutional adjudication").

To be sure, there may be circumstances in which this Court has no choice but to balance burdens on liberty against governmental interests. *See* Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. at 1186-87 (doubting that "legal determinations that do not reflect a general rule can be entirely avoided"). In particular, when the Court enforces non-comparative rights, then the content of the right cannot be defined simply by what state law generally provides to state residents. In such cases, this Court is forced to rely on its own assessment of how broadly to enforce the citizens' liberty interest.

However, when this Court enforces rights to equal treatment, the comparative nature of the right allows the Court to avoid ad hoc inquiries into the severity of burdens: the state's own laws provide the baseline by which to measure rights of the citizens. In this case, for instance, this Court can determine the content of the right to intrastate equality simply by requiring California to provide the same treatment to new bona fide residents that it provides to long-term residents.[16] Rather than

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[16] For this reason, the amicus brief filed by the Institute for Justice is incorrect to argue that *Shapiro v. Thompson* somehow protects an "entitlement to higher welfare benefits in one's new State of residence." (Institute for Justice Amicus brief at 19). *Shapiro* entitles new residents only to *non-discriminatory* treatment: they are entitled only to whatever benefits that long-term residents receive.

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ask whether California's discrimination against new residents in welfare benefits is "severe," the Court can ask whether the residential requirement is related at all to the goal of establishing the bona fide domiciliary intent of new residents. The answer to this question is easy: as noted in Part I(C) above, there is no serious argument that welfare recipients need an extra-long period of residency to establish their domiciliary intent because they are especially likely to be transients who will soon leave the state. Therefore, under the proper and judicially manageable test of constitutionality, this residency requirement should be held invalid by this Court.

III. 42 U.S.C. SECTION 604(C) CANNOT AUTHORIZE CALIFORNIA'S DURATIONAL RESIDENCY REQUIREMENT.

Congress has enacted 42 U.S.C. § 604(c), which provides that "[a] State operating a program funded under this part may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months." The amicus brief filed by the United States urges that this "federal authorization [for California's residency requirement] is of central importance" (U.S. Amicus at 24) and is "highly relevant to" the analysis that this Court applies in evaluating the constitutionality of section 11450.3. (U.S. Amicus at 18). Without specifying precisely how the federal statute should affect this Court's analysis, the United

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[16](...continued)
Memorial Hosp. v. Maricopa County, 415 U.S. 250, 261 (1974) ("the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents"). If the new state generally pays lower benefits than the new resident's former state, then the new resident is entitled only to such lower benefits.

States urges that the Court apply intermediate rather than strict scrutiny to California's residency requirement because of the federal authorization.

We respectfully disagree with the United States' analysis of the relevance of 42 U.S.C. § 604(c). As the United States concedes, the rights to interstate migration and intrastate equality protected by the Fifth Amendment, the Fourteenth Amendment's Citizenship Clause, and Article IV, section 2, are personal rights that Congress itself is prohibited from abridging. (U.S. Amicus at 24). Given this concession, it is difficult to see why the existence of a federal statute authorizing state discrimination against newcomers should affect this Court's analysis of such discrimination.

This Court has recently reiterated that "'[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.'" *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995). Therefore, if the Court agrees with amici that California's durational residency requirement violates the Fourteenth Amendment's equal protection clause, then it follows that Congress' "authorization" of this violation would itself be an arbitrary deprivation of liberty under the Fifth Amendment. This was the conclusion of this Court in *Shapiro v. Thompson*, 394 U.S. 618, 641-42 (1969), when confronted with precisely this question of whether Congress could authorize states to violate the right to interstate migration. *Id.* at 641-42 ("Congress may not authorize the States to violate the Equal Protection Clause" because such authorization "violates the Due Process Clause of the Fifth Amendment").

Viewed in light of the 14th Amendment's text and original understanding, this holding makes perfect sense. The Citizenship Clause states that citizens of the United States "are citizens of the State wherein they reside." Unlike the other three clauses of section 1, the Citizenship Clause limits both the federal and state governments, denying Congress any power to

relegate any U.S. citizen to the status of a citizen of a state other than his or her state of residence.

The experience of the antebellum period also suggests that the framers of the 14th Amendment would not give Congress broad discretion to interfere with interstate migration. The efforts of fugitive slaves to escape to Northern states and take advantage of those states' personal liberty laws dramatically illustrated how an individual's ability to flee from an oppressive state for other states more protective of liberty could be a safeguard against tyranny.[17] But the same experience suggested that the national government could suppress the liberty-preserving tendencies of federalism if it had unlimited power to interfere with interstate migration. The federal government, after all, had enacted the Fugitive Slave Acts of 1793 and 1850. These were detested by Republicans as national efforts to extend slavery into Northern states. They were regarded by abolitionist lawyers as unconstitutional laws that exceeded Congress' delegated powers.[18] Given that the 39th Congress was crucially

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[17] For a description of these personal liberty laws and how they interfered with the efforts of Southern slaveowners to recapture runaway slaves, see THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861 (Baltimore 1974); PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (Chapel Hill, N.C., 1981).

[18] JACOBUS TENBROEK, EQUAL UNDER LAW 61-63 (1965); PAUL FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY, *supra* note 5 at 323-24 (describing Republicans' "pervasive fear of a nationalization of slavery"). For famous examples of abolitionist lawyers' arguments against the constitutionality of the Fugitive Slave Acts, see Salmon P. Chase's argument in *Jones v. Van Zandt*, 46 U.S. (5 How.) 215 (1847), reprinted in SLAVERY, RACE, AND THE AMERICAN LEGAL SYSTEM 1700-1872: THE PAMPHLET

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influenced by abolitionist legal theory,[19] it seems exceedingly unlikely that the framers of the 14th Amendment meant to give Congress a blank check to interfere with individual citizens' right of interstate migration. Indeed, the framers specifically altered the 14th Amendment, transforming it from a grant of power to Congress to a self-executing declaration of individual rights, precisely because they worried that Congress could not be trusted to enforce the rights of national citizenship if Congress fell under the control of Democrats unsympathetic to the liberties of the freedmen.[20]

Admittedly, this history is suggestive rather than conclusive. However, this Court has consistently drawn a distinction between dormant commerce clause prohibitions on state governments, which Congress can freely waive, and 14th Amendment restrictions such as the right to interstate migration, which cannot be eliminated by Congress. *See Bray v. Alexandria*

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[18](...continued)
LITERATURE 436-46 (1988), in which Chase argued that Congress lacked the power to enforce the Fugitive Slave Clause of Article IV, section 2 and had no other source of power to interfere with the interstate migration of fugitive slaves. Whatever the merits of Chase's legal arguments *before* the Civil War Amendments, it is well-recognized that the framers of the 14th Amendment were heavily influenced by such abolitionist theories about the proper scope of Article IV, section 2 when they drafted the 14th Amendment. *See supra* note 6.

[19] JACOBUS TENBROEK, EQUAL UNDER LAW 234-35 (1965).

[20] *See* WILLIAM NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 55 (1988) (describing Representative Giles Hotchkiss' successful motion to amend 14th Amendment transforming it from grant of power to Congress to declaration of rights "that legislation cannot override").

Women's Health Clinic, 506 U.S. 263, 277 n.7 (1993) ("[dormant commerce cases] are irrelevant to the individual right of interstate travel we are here discussing. That right does not derive from the negative Commerce Clause, or else it could be eliminated by Congress"). It is one thing for Congress to block the movement of goods across state lines pursuant to its powers under the Commerce Clause. It is another thing altogether for Congress to presume to interfere with the free migration of U.S. citizens, which, as Justice Douglas noted in his concurrence in *Edwards v. California*, "occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal." *Edwards v. California*, 314 U.S. 160, 181 (1941) (Douglas, J., concurring). Whatever Congress' power to regulate the national economy, no one has ever suggested that Congress, any more than the states, can "prevent a citizen because he was poor from seeking new horizons in other States," *Edwards*, 314 U.S. at 181 (Douglas, J., concurring). To allow Congress to interfere with this liberty is to "withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity." *Id.*

Interstate mobility is not only an important individual liberty; it is also part of our system of federalism that Congress is constitutionally required to respect. As noted earlier, federalism preserves liberty because it gives each citizen the power to escape oppressive state laws by moving to a new state. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (federalism "makes government more responsive by putting States in competition for a mobile citizenry"). If Congress had some special power to relegate a citizen to the laws of a state where the citizen was not a resident, then this aspect of federalism would be critically undermined. The state laws imposed on citizens by Congress would follow them like a shadow, depriving them of the capacity to "vote with their feet" by migrating to states with less oppressive laws or social conditions. State officials might well have an incentive to

endorse this erosion of interstate mobility, because such loss of interstate mobility relieves them of the obligation to "compete for a mobile citizenry": instead, state officials could sit complacent behind immigration barriers authorized by Congress, and the liberty-preserving characteristic of federalism would be lost. But Congress cannot undermine our system of federalism in this way even with the cooperation and assent of the state governments themselves. *See New York v. United States*, 505 U.S. 144, 182 (1992) ("departure from the constitutional plan cannot be ratified by the 'consent' of state officials").

The amicus brief of the United States implies that, even if the interest in avoiding a race to the bottom would not be sufficient justification for a *state* residency requirement, the interest somehow becomes constitutionally sufficient when asserted by Congress. But this Court has held that Congress cannot re-define the contours of constitutional rights or constitutional federalism through ordinary legislation. *City of Boerne v. Flores*, ___ U.S. ___, 117 S. Ct. 2157, 2164 (1997) ("Congress does not enforce a constitutional right by changing what the right is"). If the enforcement power granted Congress by Section 5 of the Fourteenth Amendment does not permit Congress substantively to expand the rights the Amendment secures, as held in *Flores*, then it surely does not permit Congress to contract those rights, including the right to fully equal citizenship in the state in which a person resides.

The legislative history of 42 U.S.C. § 604(c), however, indicates that Congress made no effort to insure that state durational residency requirements were consistent with judicially recognized constitutional liberties. Contrary to the United States' amicus brief, the Congress did not elucidate any new federal interest that is consistent with this Court's precedents. Rather, Congress simply lent its imprimatur to state interests that this Court has rightly held to be insufficient to justify durational residency requirements. The House Report on 42 U.S.C. § 604 (C) simply acknowledged the holding in *Shapiro* and then

observed that this Court "has not ruled on the question of paying lower amounts of aid for incoming residents." H.R. No. 104-651, reprinted in 1996 U.S. Code, Cong., & Admin. News 2183, 2396. The floor debate was similarly cursory. As far as amici law professors can determine, members of Congress were silent about the constitutional question in the debates over the TANF block grant program. In earlier debates over a similar provision introduced as a rider to the 1992 Omnibus Budget Act, supporters of durational residency requirements again merely noted that the proposed federal statute was different from the total denial of welfare benefits struck down by this Court in *Shapiro*, but no one bothered to explain why this distinction had any constitutional significance. *See* Proceedings and Debates of the 102d Cong., 2d Sess., Friday, April 10, 1992, 138 Cong. Rec. S5413, S5474 (Remarks by Senator D'Amato) (observing that "there is a distinction that can be made and should be made" between facts of *Shapiro* and lesser reduction of welfare benefits).[21]

Congress' perfunctory allusions to *Shapiro* notwithstanding, congressional debates over durational residency requirements indicate that Congress intended to allow the states to divide state citizens between relatively privileged oldtimers and burdened newcomers for reasons that this Court has held to be illegitimate. For instance, Senator D'Amato defended an earlier and similar authorization for durational residency requirements by arguing that "we do not want to have a situation where people deliberately come to our State to receive higher benefits. That becomes injurious to *our* State, to *our* people, and to *our* taxpayers . . . ." *Id.* (Emphasis added). But this "justification"

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[21] Moreover, some members of Congress objected to even this trivial mention of the constitutional issue, arguing that "it is going to take a lot of time for a vote on constitutionality" and that reductions in federal spending alone did not themselves raise constitutional questions. *See* Remarks of Senator Domenici, *id.* at S5474-75.

for state discrimination against newly arrived residents flies in the face of equal and state national citizenship guaranteed by the Fourteenth Amendment, under which "[t]he State may not favor established residents over new residents based on the view that the State may take care of 'its own,' if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, become the State's 'own' and may not be discriminated against solely on the basis of [the recency of] their arrival." *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623 (1985).

In sum, Congress did not set forth some new and distinctive federal interest that would justify durational residency requirements consistent with this Court's precedents. Rather, Congress simply gave blanket authorization to the states to do precisely what this Court has prohibited — assign each citizen to his or her current state of residence and then authorize other states to treat those citizens as non-residents even after they migrated to a new state to establish a home for the purpose of deterring such migration. *City of Boerne v. Flores* (not to mention the very idea of a written and permanent Constitution) prohibits Congress from so casually altering the substantive scope of constitutional rights.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully Submitted.

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(22)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ELOISE ANDERSON, *et al.*,

Petitioners,

vs.

BRENDA ROE and ANNA DOE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, INC., CENTER FOR CONSTITUTIONAL RIGHTS, LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA AND PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

With the consent of the parties, the Brennan Center for Justice at New York University School of Law; the Asian American Legal Defense and Education Fund, Inc.; the Center for Constitutional Rights; the Lawyers' Committee for Civil Rights of the San Francisco Bay Area; and People for the American Way Foundation submit this brief *amici curiae* in support of Respondents.[1] Letters of consent are on file with this Court.

The Brennan Center for Justice at New York University School of Law is a nonpartisan institute dedicated to a vision of inclusive and effective democracy. The Center unites the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist both courts and legislatures in developing practical solutions to difficult problems in areas of special concern to Justice William Brennan, Jr. To that end, the Center has created a Democracy Program, which undertakes projects that promote equal citizenship and other core ideals of democratic government. The Center takes an interest in this case because California's durational residency requirement for receipt of full welfare benefits reflects a failure of the democratic process in that it treats newcomers as second-class citizens by denying them privileges afforded to long-term state residents.

The Asian American Legal Defense and Education Fund, Inc. ("AALDEF") is a national nonprofit organization providing legal assistance and education to the Asian Pacific American community. Since its founding in 1974, AALDEF has counseled thousands of women and their families in regard to their legal rights to social service benefits, including welfare, as well as their rights to protection against domestic violence. The imposition of restrictions on the right to interstate travel on welfare recipients is of great concern to the Asian American community and AALDEF. As immigrants to this country, Asian Americans have faced countless legal barriers as well as exclusion; they hold dear the right to travel including the right to

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1. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici*, has contributed monetarily to the preparation and submission of this brief.

migrate from one part of the country to another. Restrictions on residency of the type imposed by California are similar to past restrictions on Asian immigrants and equally odious.

The Center for Constitutional Rights is a progressive law, education, and advocacy organization that is dedicated to the advancement of the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. The Center, which grew out of the civil rights movement in the Deep South in the 1960s, has long been in the forefront of social and economic justice litigation. The Center takes an interest in this case because durational residency requirements for welfare recipients deny economic justice to indigent citizens.

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("Lawyers' Committee") is a civil rights and legal services organization devoted to advancing the rights of people of color, low-income individuals, immigrants and refugees, and other under-represented persons. The Lawyers' Committee is affiliated with the Lawyers' Committee for Civil Rights Under Law in Washington D.C., which was created at the behest of President Kennedy in 1963. In 1968, the Lawyers' Committee was established by leading members of the private bar in San Francisco. Given its focus on poverty and immigration issues, the Lawyers' Committee is particularly concerned with the treatment of "outsiders." Whether newcomers to this country or poor people seeking a firmer foothold in society, these new residents of a state have not been represented in the political process and therefore are entitled to heightened judicial solicitude in the face of any burden imposed on their "outsider" status.

People for the American Way Foundation ("People For") is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of civic, religious, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has over 300,000 members nationwide. People For has been actively involved in efforts to combat discrimination and promote equal rights and fair treatment, issues which are directly involved in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The statute at issue in this case, section 11450.03 of the California Welfare and Institutions Code,[2] is the product of a structurally flawed democratic process and thus invites close scrutiny from this Court. The law institutes a one-year residency requirement for receipt of full welfare benefits – discriminating against a class of residents, including respondents, who had no representation in the law-making process. Respondents were excluded from that process both legally, because they could not vote in California when the law was passed, and practically, because they are welfare recipients, a historically disempowered group.[3] The Constitution does not permit such invidious discrimination against those excluded from democratic decision-making.

There is a close relationship between the intensity of judicial review and perceived structural weaknesses in the democratic process. *See generally* John Hart Ely, *Democracy and Distrust* 105-80 (1980). In settings where the democratic process adequately considers and weighs conflicting interests, this Court applies minimal "rational basis" scrutiny to the actions of the political branches. *See, e.g., FEC v. Beach Communications, Inc.*, 508 U.S. 307, 320 (1993) (applying

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2. Cal. Welf. & Inst. Code § 11450.03(a) (1997) provides, in relevant part, that

> families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with [California's benefit schedule], not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.

3. The statute was enacted in 1992 and enjoined in 1993. *See Green v. Anderson*, 811 F. Supp. 516, 517, 523 (E.D. Cal. 1993), *aff'd*, 26 F.3d 95 (9th Cir. 1994), *vacated as unripe*, 513 U.S. 557 (1995) (per curiam). Following enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. §§ 601, *et seq.* (1998), with its purported authorization of one-year durational residency requirements for full benefits, California once again sought to enforce section 11450.03. *See Roe v. Anderson*, 966 F. Supp. 977, 979-80 (E.D. Cal. 1997) (discussing history of state and federal statutes), *aff'd*, 134 F.3d 1400 (9th Cir. 1998).

rational basis scrutiny to federal statute regulating cable television); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457-58, 461-62 (1988) (applying rational basis scrutiny to school bus fee ordinance that affected neither a fundamental interest nor a suspect class); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-9 (1974) (applying rational basis scrutiny to zoning ordinance); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359-60 (1973) (applying rational basis scrutiny to state tax law). Where, however, the targets of adverse legislative action lack the power to defend their interests effectively in the political arena, this Court will subject the actions of the political branches to greater scrutiny to assure that the majority does not unfairly burden the constitutional rights of the politically powerless. *See Bolling v. Sharpe*, 347 U.S. 498, 499 (1954); *cf. United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938) (considering whether "legislation which restricts" the democratic process or burdens "discrete and insular minorities" requires "searching judicial scrutiny").

Often, the inability of a person or group to secure adequate consideration in the political process stems from historic bias or prejudice against a "discrete and insular" political, religious, racial, or sexual minority residing in the midst of the political majority. *Carolene Prod.*, 304 U.S. at 152 n.4; *see, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135-36 (1994) (gender); *Lalli v. Lalli*, 439 U.S. 259, 265-66 (1978) (illegitimacy); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (alienage); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964) (race); *Oyama v. California*, 332 U.S. 633, 646-47 (1948) (ancestry). Other times, however, the targets of potentially unfair legislative action physically reside outside the relevant political community, with no power at all to secure adequate consideration of their interests.

Not surprisingly, this Court has consistently recognized that legislative action designed to burden such political "outsiders" by treating them worse than political "insiders" must satisfy heightened judicial scrutiny. As *Amici* demonstrate in Point I, this Court's dormant Commerce Clause jurisprudence provides consistent authority for invalidating state legislation that imposes a special or distinct

disadvantage on out-of-state interests.[4] *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981); *Raymond Motor Transp. Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978); *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767-68 & n.2 (1945). This Court has rejected deferential review when considering such protectionist legislation because state lawmakers have no incentive to deal evenhandedly with citizens outside their constituency. *See, e.g., West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200 (1994); *South-Central Timber Dev. Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984); *South Carolina State Highway Dep't v. Barnwell Bros. Inc.*, 303 U.S. 177, 184-86 & n.2 (1938).

The Court has also applied heightened scrutiny under the Equal Protection Clause when reviewing state legislation affecting new residents — especially in right-to-travel cases. *See* Point II. In a wide range of contexts — from government benefits and voting to health care, veterans benefits, and education — this Court has refused to permit longtime residents to treat newcomers, especially poor newcomers, as second-class citizens. The Court's willingness to apply heightened scrutiny — sometimes full-fledged strict scrutiny and other times a skepticism akin to "rational basis with a bite"[5] — suggests that judicial intervention is proper when new residents have been excluded from the political process.

In each of the last three generations, entrenched political majorities have sought to prevent poor newcomers from migrating to their states by forcing the newcomers to live under harsh,

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4. The Commerce Clause assigns to Congress the power "[t]o regulate Commerce ... among the several States." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause in its "dormant" or "negative" state provides the authority for the Court's long line of decisions reviewing state regulations of interstate commerce. *See, e.g., New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988) (citing dormant Commerce Clause cases).

5. David A. Donahue, Note, *Penalizing the Poor: Durational Residency Requirements for Welfare Benefits*, 72 St. John's L. Rev. 451, 464 (1998); *see City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 459 n.4 (1985) (Marshall, J., concurring in part and dissenting in part) (describing Court's application of heightened scrutiny in right-to-travel cases under guise of rational basis review).

discriminatory rules that do not apply to long-time residents. In the 1930s, states threatened those who aided poor newcomers with incarceration. *See Edwards v. California*, 314 U.S. 160, 171, 177 (1941) (striking California law that made it a misdemeanor to bring into the state an indigent person). Later, states threatened newcomers with starvation by denying them subsistence benefits. *See Shapiro v. Thompson*, 394 U.S. 618, 621-26 (1969) (striking state laws that required one year of residency before new residents would become eligible for welfare benefits). Now California is threatening poor newcomers with the prospect of inadequate benefits — benefits so low that even the State concedes they will cause significant hardship. *See Roe v. Anderson*, 966 F. Supp. 977, 982-83 (E.D. Cal. 1997) (noting that California does "not disagree with plaintiffs' contention that there will be disparities, even significant disparities, . . . between newcomers and recipients who have resided in the state for one year"), *aff'd*, 134 F.3d 1400 (9th Cir. 1998).

In *Edwards* and *Shapiro*, this Court rebuffed state efforts to deter the migration of newcomers by treating them as second-class citizens. No basis exists to hold that hunger or homelessness are more constitutionally palatable deterrents to poor newcomers than the threats of prison and starvation invalidated in *Edwards* and *Shapiro*. The laws singling out these politically and economically disadvantaged outsiders should be subject to strict judicial review, but under any standard, these laws cannot withstand constitutional scrutiny.

Finally, Congress's effort to authorize states to treat newcomers as second-class citizens cannot save California's effort to deter the migration of poor persons into the State. *See* Point III. Congress simply cannot authorize states to violate the Equal Protection Clause. *See Shapiro*, 394 U.S. at 641.

ARGUMENT

I.

THE COURT'S DORMANT COMMERCE CLAUSE JURISPRUDENCE DEMONSTRATES THAT HEIGHTENED SCRUTINY IS REQUIRED WHEN STATES DISCRIMINATE AGAINST OUTSIDERS.

The Court's dormant Commerce Clause jurisprudence has long reflected the Court's unwillingness to defer to the legislative process when lawmakers disproportionately burden those who are not politically represented (out-of-staters) and are powerless to hold political leaders accountable. Although *amici* do not argue that the Court's Commerce Clause jurisprudence controls consideration of this case, that tradition, including the ground-breaking Commerce Clause case of *Edwards v. California*, 314 U.S. 160 (1941), provides support for applying heightened scrutiny in this case.

Since the 1930s, heightened judicial scrutiny under the Commerce Clause has checked an undemocratic tendency in our federal system to burden those not represented in local political processes. Chief Justice Stone introduced this theory of the Commerce Clause and its process-based approach to judicial review, stating:

> [T]he Court has often recognized that to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.

Southern Pac. Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 767 n.2 (1945); *see also South Carolina State Highway Dep't v. Barnwell Bros. Inc.*, 303 U.S. 177, 184 n.2 (1938).

The Court's decision in *Barnwell Bros.* also illustrates its early reliance on the nature of the democratic process as a rationale for its decision-making in Commerce Clause cases. In *Barnwell Bros.*, the Court upheld a South Carolina regulation that banned trucks wider than 90 inches or heavier than 20,000 pounds from State highways, even though the regulation significantly burdened interstate

commerce. *See* 303 U.S. at 180, 187. The Court found that the regulations also had a significant adverse effect on shippers within the State, and thus that South Carolina's political processes could be relied upon to "safeguard against [the regulations'] abuse." *Id.* at 187.

In its "modern" Commerce Clause cases, the Court has continued to turn to the process-based rationale to support its searching review of state legislation that may interfere with interstate commerce.[6] In those cases, the Court has refused to presume that the political process will function as a check on legislatures that have burdened out-of-state businesses or interests. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675-66 (1981) ("Less deference to the legislative judgment is due, however, where the local regulation bears disproportionately on out-of-state residents and businesses."); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978). In *Raymond Motor*, for instance, the Court struck down a Wisconsin law restricting the operation of trucks longer than 55 feet because an array of protectionist exemptions "undermine[d] the assumption that the State's own political processes will act as a check on local regulations that unduly burden interstate commerce." 434 U.S. at 447. Before striking the law, the Court discussed its history of deference to state regulation in the field of "highway safety," *id.* at 443, stating:

> [S]pecial deference to state highway regulations derives in part from the assumption that where such regulations do not discriminate on their face against interstate commerce, their burden usually falls on local economic interests as well as other States' economic interests, thus

6. State laws that are facially neutral but burden interstate commerce are reviewed under a balancing test which asks: (1) whether the regulation is rationally related to a legitimate state end and, if so, (2) whether the regulatory burden imposed on interstate commerce is outweighed by the state interest in enforcing the regulation. *See, e.g., Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 186-87 (1950); *Southern Pac.*, 325 U.S. at 770-71. Laws that explicitly discriminate against interstate commerce — "protectionis[t]" regulations — are subject to a "virtually per se rule of invalidity." *City of Philadelphia. v. New Jersey*, 437 U.S. 617, 624 (1978); *cf. Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 342 (1992) (applying the "strictest scrutiny" to protectionist legislation).

> insuring that a State's own political processes will serve as a check against unduly burdensome regulations.

Id. at 444 n.18; *see also Maine v. Taylor*, 477 U.S. 131, 139 (1986) ("[A]ny relaxation in the restrictions on state power otherwise imposed by the Commerce Clause unacceptably increases 'the risk that unrepresented interests will be adversely affected by restraints on commerce.' ") (quoting *South-Central Timber Dev. Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984)); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 350-53 (1977).

In *Edwards v. California*, the Court explicitly relied on the Commerce Clause to invalidate a California law that made it a crime to transport a destitute person into the jurisdiction. *See* 314 U.S. at 172-73. Although the *Edwards* Court based its decision on a principle of federalism – that the Commerce Clause proscribes any state's attempt to isolate itself from national problems by restraining the movement of poor people into the state – the opinion also finds support in the democratic failure theory. The Court applied heightened scrutiny to the California statute in part because the individuals burdened by the law were excluded from the political process, stating that "the indigent non-residents who are the real victims of the statute are deprived of the opportunity to exert political pressure upon the [state] legislature in order to obtain a change in policy." *Id.* at 174 (citing *Barnwell Bros.*, 303 U.S. at 185 n.2).

The Court's willingness to intervene in Commerce Clause matters, based on a theory of democratic failure, provides substantial support for the Court's intervention here, where California has once again attempted to penalize the poor for coming to the State.[7] The individuals affected by section 11450.03 were excluded from the political process because, like the out-of-state truckers in *Raymond Motor*, they were not residents of the State when the law was enacted. In addition, respondents' poverty makes it unlikely that any insiders will fairly represent their interests. This kind of double exclusion

7. For a compelling analysis of how the Commerce Clause would apply to durational residency requirements, *see* Stephen Loffredo, *"If You Ain't Got the Do, Re, Mi": The Commerce Clause and State Residence Restrictions on Welfare*, 11 Yale L. & Pol'y Rev. 147 (1993).

warrants application of the theory of judicial review developed in the Commerce Clause cases, under which the Court should strike down the California statute.[8]

II.

THE COURT'S PROTECTION OF NEWCOMERS UNDER THE EQUAL PROTECTION CLAUSE AND THE RIGHT TO TRAVEL DEMONSTRATES THAT STRICT SCRUTINY IS REQUIRED HERE.

The Court's review of state legislation affecting new residents (as opposed to the non-residents burdened in the Commerce Clause cases) also reflects its fundamental concern for those who are outside the political system. In a wide variety of contexts, including

- government benefits,
- voting,
- health care,
- veterans benefits, and
- education

the Court has interpreted the Equal Protection Clause and the right to travel to preclude state laws that make access to a benefit or service contingent on length of residency. And, as *amici* demonstrate below in their survey of the Court's decisions in this area, the Court's

8. *Amici* do not rely on the dormant Commerce Clause as direct authority for striking section 11450.03. However, *amici* do suggest that the Court's dormant Commerce Clause jurisprudence is illustrative of the Court's general skepticism toward laws burdening outsider interests. Without question, Congress may authorize state regulations that would violate the dormant Commerce Clause in the absence of such authorization. *See Maine v. Taylor*, 477 U.S. at 138-39. However, Congress may not authorize state regulations that violate the Equal Protection Clause, and it is, at a minimum, the Equal Protection Clause that would be violated by California's enforcement of section 11450.03. *See Shapiro v. Thompson*, 394 U.S. 618, 641 (1969); Point III *infra*.

application of heightened scrutiny to laws that burden newcomers reflects an underlying suspicion of legislation that selects outsiders, such as the poor newcomers here, for discriminatory treatment.

A. Government Benefits

The Court's decisions on the distribution of government benefits to newcomers indicate an awareness, explicit in the Commerce Clause cases, that heightened judicial review is necessary when the legislative branch adopts laws that disproportionately burden those outside the system. Beginning with *Shapiro v. Thompson*, 394 U.S. 618 (1969), those cases recognize that democratic institutions often neglect the rights and interests of outsiders and that courts have an obligation to remedy such failures of the democratic process.

In *Shapiro*, the Court applied strict scrutiny to invalidate state laws imposing a one-year durational residency requirement for the receipt of welfare benefits, holding that the residency requirement unduly burdened the right to travel.[9] *See id.* at 638. The Court explained that the freedom to travel between the states is a fundamental right of American citizens, *see id.* at 630, and that the laws had not been shown "necessary to promote a compelling governmental interest," *id.* at 634; *see id.* at 638.

The *Shapiro* Court's decision to apply a heightened level of review served to protect the most marginalized elements of society – poor newcomers who had no had opportunity to participate politically in decisions affecting their lives – from political insiders seeking to save money by forcing newcomers to bear the burdens of budget austerity. The Court explained that "the effect of the waiting-period requirement . . . is to create two classes of needy resident families indistinguishable from each other except" for length of residence. *Id.* at 627. *Shapiro*

9. A law burdens the right to travel, and thereby triggers strict scrutiny, "when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right." *Attorney General v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (plurality opinion) (internal citations and quotations omitted); *see id.* at 920-22 (O'Connor, J., dissenting).

thus demonstrates an overriding concern that poor newcomers be treated as equal citizens.[10]

The Court rejected every justification that the States offered for burdening outsiders. First, the Court rejected the argument that by deterring poor people from migrating into the States, the States would better be able to provide for their long-term residents. *See id.* at 627-28. The Court explained that "the purpose of deterring the in-migration of indigents . . . is constitutionally impermissible." *Id.* at 631. A state may not preserve resources for long-term citizens by denying benefits to otherwise similarly situated new residents. *See id.* at 627-32. The distinction could not be made even if the new residents moved solely to receive larger benefits. "[A] State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally." *Id.* at 631.

Second, the Court rejected the claim that a state may "distinguish between new and old residents on the basis" of past tax contributions. *Id.* at 637. Such reasoning

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10. Although the Court invoked the right to travel to justify the application of strict scrutiny, *Shapiro* and its progeny "clearly have less to do with constraints on migration and travel than with the unconstitutionality of distinctions between residents based on how long they have lived in the state." *Green v. Anderson*, 811 F. Supp. 516, 520 (E.D. Cal. 1993), *aff'd*, 26 F.3d 95 (9th Cir. 1994), *vacated as unripe*, 513 U.S. 557 (1995). As one commentator has noted:

> The right to travel rationale alone, under which the waiting periods are seen as deterrents or penalties for poor people desiring to start afresh in life . . . cannot quite support these decisions; it is at least as great a deterrent to travel when the second state provides no welfare assistance at all, or offers significantly lower benefits although with no waiting period; yet the right to travel has not been read to require any minimum level of welfare benefits. A large component of these decisions must therefore be the heightened level of evenhandedness . . . which the Court has imposed on programs purporting to provide for the needy.

Laurence H. Tribe, *American Constitutional Law* § 16-48, at 1118 (1978) (footnote omitted).

> would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens.

Id. at 632-33. The Court ruled that the Equal Protection Clause does not permit states to create classes of favored citizens with exclusive entitlement to government services. *See id.*

Third, the Court rejected several administrative justifications for the one-year waiting period. *See id.* at 633-38. The States had argued, *inter alia*, that the waiting period: (1) provided an objective test of *bona fide* residency; (2) minimized the opportunity for fraud; and (3) encouraged new residents to enter the labor force. *See id.* at 633-34.[11] The Court rejected the first two justifications as impermissible efforts to save the costs associated with determining *bona fide* residency by shifting them onto new residents. Considering the third justification, the Court concluded that "[a] state purpose to encourage employment provides no rational basis for imposing a one-year waiting-period restriction on new residents only." *Id.* at 637-38.

In sum, states could neither treat indigent newcomers more harshly than long-term residents nor force indigent newcomers to bear the full costs of the states' attempts to control their budgets. Durational residency requirements constituted an "invidious discrimination" denying new citizens equal protection. *Id.* at 627. Governments that were "unwilling to ask current members of the community to make any sacrifices" could not "shift burdens onto future newcomers" who were unable to complain. Robert C. Farrell, *Classifications That Disadvantage Newcomers and the Problem of Equality*, 28 U. Rich. L. Rev. 547, 548 (1994).[12]

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11. The States had also argued that the waiting period facilitated the planning of the welfare budget. The Court held that this argument was unfounded because the States in fact relied on other methods to make budget estimates. *See Shapiro*, 394 U.S. at 634-35.

12. In contrast, the Court has been more deferential towards regulations burdening new residents where circumstances indicate that the democratic

(Cont'd)

In a subsequent government benefits case invalidating Alaska's plan to distribute revenue from oil sales to its citizens based on length of State residency, the Court continued its close scrutiny of laws that undermine the rights of newcomers to be treated as full and equal members of the polity. *See Zobel v. Williams*, 457 U.S. 55, 61-65 (1982). Although the *Zobel* Court purported to apply rational basis review,[13] it plainly engaged in a more searching inquiry than is traditionally applied under that standard. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 459 n.4 (1985) (Marshall, J., concurring in part and dissenting in part) (describing *Zobel* as an "intermediate review decision[ ] masquerading in rational-basis language"); *Hicks v. Peters*, 10 F. Supp. 2d 1003, 1006 n.4 (N.D. Ill. 1998); Farrell, *supra*, at 561.

The *Zobel* Court's close review, like that in *Shapiro*, reflected the need to protect new residents and to eliminate the invidious distinction between outsiders and insiders. The Court stated that

> Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency. It would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible.

(Cont'd)
process can be expected to treat "outsiders" fairly. Thus, in *Nordlinger v. Hahn*, 505 U.S. 1, 18 (1992), the Court upheld Proposition 13, a California law which exempted new homeowners from a cap on property tax increases. Because the plaintiff was a California resident at the time the law was adopted, the Court refused to apply strict scrutiny on the basis of the right-to-travel cases. *See id.* at 11. *Nordlinger* is thus analogous to *Barnwell Bros.*, discussed in Point I *supra*: Proposition 13 affected long-term residents and newcomers alike, and thus there was no reason to fear a breakdown of the State's democratic processes. *See Nordlinger*, 505 U.S. at 17 ("the Constitution presumes that, *absent some reason to infer antipathy*, even improvident decisions will eventually be rectified by the democratic process") (emphasis added) (internal quotations omitted).

13. The Court found it unnecessary to consider whether strict scrutiny was required, because the law failed even under the most relaxed standard of review. *See Zobel*, 457 U.S. at 60.

Zobel, 457 U.S. at 64 (footnotes omitted). The Court concluded that the plan's obvious purpose, to "favor[ ] established residents over new residents, is constitutionally unacceptable." *Id.* at 65 (internal quotations omitted). According to Justice Brennan,

> the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship only with simple residence. That Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence.

Id. at 69 (Brennan, J., concurring).[14]

In striking down two-tiered welfare benefit systems, lower federal courts have also recognized the unconstitutionality of laws that burden outsiders who had no opportunity to participate in the adoption of the legislation under challenge. For example, in previously striking down California's two-tier welfare benefits system, one district court explained that a

> State may not identify a group of current residents as its own and seek to advance their interests and address their needs to the detriment of new residents . . . [because] [s]uch a division . . . violates equal protection.

Green v. Anderson, 811 F. Supp. at 522; *see Westenfelder v. Ferguson*, 998 F. Supp. 146, 154 (D.R.I. 1998) (Rhode Island's two-tier welfare statute "sends a clear message to [newer residents] that they are unworthy of the same treatment accorded longtime residents").[15]

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14. As one commentator has argued:

> United States citizens become citizens of the states wherein they reside. There are no waiting periods. And, just as it would violate the Constitution to deny these new arrivals state citizenship, it would violate the Constitution to concede their citizenship in name only while treating them as if they were still citizens of other states. That should mean that it is unconstitutional to deny benefits to new citizens that are extended to other citizens similarly situated. . . .

William Cohen, *Discrimination Against New State Citizens: An Update*, 11 Const. Commentary 73, 79 (1994).

15. In addition, several state courts have stuck down two-tier welfare benefit systems similar to the one under consideration here. *See Mitchell v.*
(Cont'd)

Shapiro and its progeny provide the constitutional framework for considering laws that disproportionately burden outsiders. These cases demonstrate that the Court must closely scrutinize such laws to ensure that insiders have not unconstitutionally shifted their costs onto communities excluded from participation in the political process. The risk that insiders will unconstitutionally benefit themselves at the expense of outsiders is too great to do otherwise. And the heightened scrutiny applied in *Shapiro* is especially important when it is the poorest of Americans who are made to bear social costs.

B. Voting

The special care taken by this Court in reviewing durational residency requirements for voting is further evidence that the Court applies heightened scrutiny in cases that suggest a democratic failure. While all durational residency requirements burden outsiders who played no role in the adoption of the waiting period, durational residency requirements for voting cut closer to the core of the problem. These waiting periods exclude newcomers from prospective participation in the political process, causing future failures of the democratic process and cementing the dominant position of long-term residents.

In *Dunn v. Blumstein*, 405 U.S. 330, 337-38 (1972), the Court applied strict scrutiny to invalidate a durational residency requirement that denied the franchise to newcomers who were *bona fide* state residents. The Tennessee law required newcomers to reside in the State for one year and their county for three months before they could register to vote. *Id.* at 334. The Court held that the Equal Protection Clause did not countenance this treatment of new residents.[16] *Id.* at 360.

(Cont'd)
Steffen, 504 N.W.2d 198, 202-3 (Minn. 1993) (invalidating Minnesota two-tier welfare statute); *Sanchez v. Department of Human Servs.*, 713 A.2d 1056, 1061-66 (N.J. Super. Ct. App. Div. 1998) (invalidating New Jersey two-tier welfare statute); *Brown v. Wing*, 649 N.Y.S.2d 988, 995 (Sup. Ct. 1996) (invalidating New York two-tier statute for Home Relief benefits), *aff'd*, 663 N.Y.S.2d 1025 (App. Div. 1997).

16. Applying strict scrutiny, the Court has approved 50-day durational residency requirements for voter registration. Unlike the one-year period (Cont'd)

At the heart of the *Dunn* Court's decision to closely scrutinize Tennessee's durational residency requirement was the law's denial of the primary means to political power in the State – the franchise – to an already disempowered class. By denying the franchise to newcomers, insiders could cement their control over the democratic institutions of the State, furthering the exclusion of the outsiders. As the Court noted, "the historical purpose of [Tennessee's] durational residency requirements seems to have been to deny the vote to undesirables, immigrants and outsiders with different ideas" than the State's insiders. *Id.* at 355 n.27 (internal quotations omitted).[17] Denying the franchise to outsiders was certainly the law's effect.

The Court complained that durational residency voter registration requirements "divide residents into two classes, old residents and new residents, and discriminate against the latter to the extent of totally denying them the opportunity to vote." *Id.* at 334-35. "By denying [new] citizens the right to vote, such laws deprive them of 'a fundamental political right, . . . preservative of all rights.' " *Id.* at 336 (quoting *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)) (alteration in original). Strict scrutiny was required in order to ensure that members of the politically burdened outsider class of newly arrived citizens were afforded their "constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Id.* Whether the law was understood as a denial of the right to vote or as a penalty on the right to travel, *see id.* at 337-38, its effect was the same: the law created classes of old and new residents and excluded the latter from the political process. Such government action demands strict judicial scrutiny. *See id.* at 341-42; *see also Carrington v. Rash*, 380 U.S. 89, 93-94 (1965) (striking down Texas statute denying franchise to persons who became Texas residents while members of military because all *bona fide* residents "have a right to an equal opportunity for political representation").

(Cont'd)
rejected in *Dunn*, the 50-day period was administratively necessary for the preparation of accurate voter lists and thus did not unnecessarily disadvantage new state citizens. *See Marston v. Lewis*, 410 U.S. 679, 681 (1973) (per curiam); *Burns v. Fortson*, 410 U.S. 686, 686-87 (1973) (per curiam).

17. The Court did not rely on this historical purpose in striking down the law. *See Dunn*, 405 U.S. at 355 n.27.

The *Dunn* Court's application of strict scrutiny further demonstrates its central concern with protecting those who have been excluded from the political process in the past from suffering from continued exclusion at present and in the future. Tennessee offered two explanations for its waiting period for voter registration, each of which the Court rejected. First, the Court rejected the State's contention that the waiting period was necessary to protect against fraud and to ensure that the ballot was limited to *bona fide* State residents, *see Dunn*, 405 U.S. at 345, on the ground that the State could achieve these goals without forcing new *bona fide* residents to sacrifice the right to vote. Just as in *Shapiro*, the Court held that states could not sacrifice the rights of outsider citizens to save insider citizens from the cost of making residency determinations.

More importantly, the Court also rejected Tennessee's second explanation: that the durational residency requirement

> [a]fford[ed] some surety that the voter has, in fact, become a member of the community and that as such, he has a common interest in all matters pertaining to its government and is, therefore, more likely to exercise his right more intelligently.

Id. at 345. The Court held that this purpose was impermissible.

> "[T]he fact that newly arrived [residents] may have a more national outlook than longtime residents, or even may retain a viewpoint characteristic of the region from which they have come, is a constitutionally impermissible reason for depriving them of their chance to influence the electoral vote of their new home state."

Id. at 355-56 (quoting *Hall v. Beals*, 396 U.S. 45, 53-54 (1969) (per curiam) (Brennan, J., dissenting)); *see Carrington*, 380 U.S. at 94 ("Fencing out from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.") (internal quotations omitted). Insiders could not protect their own political power by denying the franchise to citizens who might have different opinions or social mores, or who might simply object to the insiders'

penchant for shifting fiscal burdens onto unrepresented outsiders. Thus, *Dunn* confirms the Court's intention to safeguard outsiders from failures of the democratic process caused by their exclusion from political participation.[18]

C. Health Care

In *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), the Court was again called on to review a State statute that denied new residents access to a service that was available to other residents. Relying on the *Shapiro* and *Dunn* decisions, the Court strictly scrutinized and held unconstitutional an Arizona law requiring one year's residence in a county before an indigent was eligible to receive non-emergency medical care at county expense. *See id.* at 252-54. The statute made no distinction between transients and *bona fide* residents; only those who had lived in the county for one year qualified for care. New residents were allowed to receive emergency care for free. *See id.* at 252 & n.2.

The law at issue in *Maricopa County* forced the Court to consider whether states could favor long-term residents in the distribution of medical care, which had never been considered a fundamental right and was available to all in cases of emergency. Applying the analysis developed in *Shapiro* and *Dunn*, the Court held that the law denied new residents access to a necessity as basic as welfare benefits and thus impermissibly burdened newcomers' right to travel. *See* 415 U.S. at 259. "[T]he right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents." *Id.* at 261. The Court's analysis, again, seems to turn on whether the

18. A state may have a stronger interest in restricting elective office to long-term residents than it does in limiting the franchise to long-term residents. It is not wholly unreasonable for a state to require some understanding of local issues and some connection with potential constituents from a person seeking to represent the interests of state residents. This factor may explain the Court's summary affirmance of New Hampshire's seven-year durational residency requirement for high state offices. *See Sununu v. Stark*, 420 U.S. 958 (1975) (mem.) (state senator), *aff'g* 383 F. Supp. 1287 (D.N.H. 1974); *Chimento v. Stark*, 414 U.S. 802 (1973) (mem.) (governor), *aff'g* 353 F. Supp. 1211 (D.N.H.).

political process has treated a newcomer, an "outsider," differently than a long-term resident, an "insider."

The Court's choice of Biblical admonition, " 'Ye shall have one manner of law, as well for the stranger, as for one of your own country,' " *id.* (citing Leviticus 24:22 (King James)), also suggests that the Court was suspicious of legislation that singled out "the stranger" who had been excluded from the political process. The people burdened by the legislation considered in *Maricopa County* were not only strangers to the political system in that they had been in the area less than one year, but they were strangers in that they were indigent and thus members of a group that often is excluded *de facto* from the political process.

The Court's analysis of whether this burden on newcomers was "legitimately defensible," *id.* at 262, also illustrates its underlying willingness to deeply scrutinize the legislative process when outsiders have been burdened and to strike such "protectionist" legislation. After brushing aside the State's asserted desire to save public money as an insufficient reason to penalize the right to travel, *see id.* at 263, the Court explicitly held that the State's avowed goal of inhibiting the immigration of indigents was constitutionally impermissible, *see id.* at 263-64. The Court also refused to give weight to the State's concern that the threat of an influx of indigents would discourage the building of good public medical facilities and that barring recent immigrants from using the programs would shore up public support for such facilities. *See id.* at 266-67. In each case, the State's asserted rationale made plain that the adoption of the durational residence requirement was motivated by exclusion and protectionism; the political will behind the law was contingent on burdening those who were not a part of the political process.

While a state's interests in maintaining the public fisc and ensuring a program's political viability are not inherently improper, *Maricopa County* shows that laws receive increased scrutiny when a state seeks to achieve those goals by burdening political outsiders. *Maricopa County* reaffirms the central lesson of *Shapiro* and *Dunn*: a state may not create a class of disfavored citizens defined by their recent migration to the state.

D. Veterans Benefits

The Court has applied heightened scrutiny – both strict scrutiny and rational basis "with a bite" – to laws giving special benefits to veterans who have lived in the state for a certain period of time. These cases involve "fixed-point" residency requirements: laws that create distinctions between residents based on non-residence at a previous point in time. The Court's scrutiny of legislative categorizing here is consistent with a suspicion of laws that favor vested interests over newer residents who have less political power.

The Court's decision in *Attorney General v. Soto-Lopez*, 476 U.S. 898, 900-01 (1986), is illustrative. There, the Court ruled that New York could not grant a civil service employment preference to its residents who were war-time military veterans and who were New York residents when they entered military service, while at the same time denying a preference to otherwise similarly situated New York residents simply because they were not New York residents when they entered the military. The Court emphasized that the law improperly "classif[ied] residents according to the time they established residence, result[ing] in the unequal distribution of rights and benefits among otherwise qualified *bona fide* residents," *id.* at 903, "favoring 'prior' residents over 'newer' ones," *id.* at 905 (plurality opinion).[19] A plurality of the Court closely examined the law to determine whether New York had indefensibly attempted to hoard State jobs for a preferred class of long-term citizens.

The plurality found that New York's fixed-point residency requirement failed strict scrutiny because each of the interests

19. Lower courts following *Soto-Lopez* have also emphasized the arbitrariness of using fixed point residency requirements to establish a resident's access to government employment. *See Grace v. City of Detroit*, 760 F. Supp. 646, 649, 651 (E.D. Mich. 1991) (applying strict scrutiny to strike rule creating durational residency requirement for city employment); *Perez v. Personnel Bd.*, 690 F. Supp. 670, 674 (N.D. Ill. 1988) ("[T]he government must justify any statute, regulation or policy that denies an individual a benefit or privilege on account of the individual's status as . . . a . . . new resident . . . [under] close[ ] [judicial] scrutiny."); *cf. Nehring v. Ariyoshi*, 443 F. Supp. 228, 237-39 (D. Haw. 1977) (pre-*Soto-Lopez* case applying strict scrutiny to strike one-year durational residency requirement for public employment).

proffered by New York in defense of the law could be furthered without discriminating between long-term and newer residents. New York argued that its rule: (1) encouraged New York residents to enlist in the armed services; (2) eased residents' transition to civilian life; (3) induced New York residents to return to New York upon leaving the service; and (4) aided in the recruitment of "a uniquely valuable class of public servants who possess useful experience acquired through their military service." *Id.* at 909. However, as the Court recognized, "each of the State's asserted interests could be promoted fully by granting bonus points to all otherwise qualified veterans." *Id.* Plainly, the fixed-point residency requirement did not simply aid veterans who were New York citizens; that aim could be achieved by providing civil service bonus points to any veteran who migrated to New York and made the State his or her home. Rather, New York was interested only in helping a certain class of citizens – well-established New Yorkers. That purpose is impermissible. *See id.* at 911 ("Once veterans establish *bona fide* residence in a State, they become the State's own and may not be discriminated against solely on the basis of the date of their arrival in the State.") (internal quotations omitted). The plurality concluded that the law was not narrowly tailored to serve a compelling interest, and therefore unconstitutionally discriminated against an already disadvantaged class of outsiders. *See id.* at 911-12; *cf. id.* at 915 (Burger, C.J., concurring) (applying rational basis review and striking law; "[T]he New York statute suffers from the same constitutional flaw as the Alaska statute in *Zobel*," because it "favor[s] established residents over new residents.") (internal quotations omitted).

Similarly, the Court in *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623-24 (1985), struck down a New Mexico statute that provided tax benefits to Vietnam veterans who were New Mexico residents before May 8, 1976; veterans who moved into New Mexico after that date were not eligible for the tax benefits. The *Hooper* Court held that the New Mexico statute was "not supported by any identifiable state interest." *Id.* at 623.[20] The Court's lack of deference, even as it purported to apply a rational basis test, indicates its hostility to the statute's "creat[ion] [of] two tiers of resident Vietnam veterans,

20. As in *Zobel*, the Court deemed it unnecessary to consider whether strict scrutiny applied because the law could not pass even rational basis review. *See Hooper*, 472 U.S. at 618.

identifying resident veterans who settled in the State after May 8, 1976, as in a sense 'second-class citizens.' " *Id.* at 623.

Soto-Lopez and *Hooper* both demonstrate the Court's willingness to closely scrutinize laws benefitting veterans when those laws treat veterans with deep roots in the state differently than veterans who are more recent arrivals. Once a veteran establishes residency in the state, his or her date of entry is not a legitimate basis for differential government treatment.

E. Education

Finally, the Court's decisions in the field of education demonstrate the democratic underpinnings of the Court's "newcomer" or "outsider" jurisprudence. The laws overturned in these cases illustrate classic failures of the democratic process, where insiders try to assign a greater burden to outsiders and permanently exclude them from participation in the American democratic process.

In *Plyler v. Doe*, 457 U.S. 202, 205, 223-24, 230 (1982), the Court engaged in heightened scrutiny, while purporting to apply rational basis review, in striking down a Texas statute that withheld from local school districts any state money for the education of children whose parents were illegal immigrants. The law, which seemingly aimed to punish outsiders who had relocated within Texas, also authorized local school districts to refuse these children enrollment in school. The State argued that this exclusion was proper because the children were illegal immigrants under federal law and that it furthered the State's interest in the "preservation of the state's limited resources for the education of its lawful residents." *Id.* at 227.

The Court's analysis of Texas's interests in excluding these children was not at all deferential – it all but dropped the presumption of constitutionality and took up a searching judicial inquiry. Whereas courts applying rational scrutiny normally require that a challenged law furthers a legitimate state interest, the *Plyler* Court explained that Texas's law could not "be considered rational unless it furthers some *substantial* goal of the State." *Id.* at 224 (emphasis added). Thus, even more than the Court in *Zobel*, the *Plyler* Court explicitly engaged in rational basis review with a bite.

None of Texas's asserted interests could justify the burden imposed by the statute. The Court dismissed the State's contention that it was trying to protect itself from a flood of illegal immigrants, noting that law was a "ludicrously ineffectual attempt to stem the tide of illegal immigration." *Id.* at 228 (internal quotations omitted). The Court also brushed aside the State's asserted interest in protecting its "ability to provide high-quality public education," *id.* at 229, because the State could not show that the exclusion of undocumented children was likely to improve the quality of education provided in the State, *see id.* Finally, the Court rejected, as utterly without basis, the State's claim that undocumented children were less likely than others to remain in the State after the completion of their education and make a positive contribution to the life of Texas. *See id.* at 229-30. The Court concluded: "It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries. . . ." *Id.*

The Court applied heightened scrutiny after explicitly reiterating its earlier holdings that education is not a fundamental right and that illegal aliens are not a suspect class under equal protection analysis. *See id.* at 219-21 & n.19. The Court's searching review recognized the civic function of education and the importance of public schools in training children to become full participants in the community. "We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." *Id.* at 221.[21] The Court

21. By contrast, the Court's review is deferential when *bona fide* residency requirements are at issue. *See Martinez v. Bynum*, 461 U.S. 321, 326-29, 332 (1983) (upholding Texas law creating presumption that children living in school district with someone other than parents were not *bona fide* residents, but allowing such children to challenge presumption and establish residency); *see also Vlandis v. Kline*, 412 U.S. 441, 453 (1973) (striking Connecticut law creating an irrebuttable presumption of non-residency for tuition purposes, but approving state's interest in preserving "right of its own *bona fide* residents to attend [public universities] on a preferential tuition basis"); *Starns v. Malkerson*, 401 U.S. 985 (1971) (mem.), *aff'g* 326 F. Supp. 234 (D. Minn. 1970) (upholding one-year durational residency requirement for in-state tuition).

The Court's decision in *Sosna v. Iowa*, 419 U.S. 393 (1975), also reflected (Cont'd)

refused to defer to the legislature because the law not only placed a disproportionate burden on outsiders but threatened to ossify their status as a permanent underclass. *See id.* at 219 ("The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.").

Thus, in considering the constitutionality of durational residency requirements under the Equal Protection Clause, the Court has revealed its disapproval of state laws that create two classes of citizens – newcomers who are excluded from the full benefits of state citizenship and long-term residents who are given preferential treatment. Section 11450.03 is such a law, because it discriminates against newcomers who, by definition, were denied any opportunity to participate in the process that led to its adoption. Worse, it singles out poor newcomers, a class that is often singularly unable to defend its rights in the political sphere. The Court is obligated to apply strict scrutiny to invalidate section 11450.03 in order to remedy this failure of the democratic process.

III.

CONGRESSIONAL ACTION CANNOT SAVE CALIFORNIA'S DURATIONAL RESIDENCY REQUIREMENT BECAUSE CONGRESS MAY NOT AUTHORIZE LOCAL MAJORITIES TO VIOLATE THE EQUAL PROTECTION CLAUSE.

The unconstitutionality of California's discrimination against poor newcomers cannot be avoided by appeal to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), 42 U.S.C. §§ 601, *et seq.* (1998), because Congress may not delegate to entrenched state majorities the standardless discretion to force poor newcomers to live as second-class citizens. *E.g.*, *Shapiro*, 394 U.S. at 641. The relevant political majority in

(Cont'd)
a concern for *bona fide* residency. In *Sosna*, the Court upheld Iowa's requirement that a plaintiff reside in the State for one year before filing a divorce action. *See id.* at 396. The requisite connection to the State served Iowa's interest in avoiding interference in matrimonial matters of primary importance to other states, and in preventing collateral attacks to the divorce decrees of its own courts. *See id.* at 406-08.

such circumstances is not the national majority (which has simply decided not to decide), but state decision-makers who actually determine whether to impose discriminatory hardships on poor newcomers.[22] Heightened scrutiny under the Equal Protection Clause is required precisely because newcomers are absent from the state decision-making fora where these decisions are, in fact, made. Were Congress to possess the power to release state majorities from the constraints imposed by the Equal Protection Clause, crucial protections for state minorities would be at the mercy of a decision-making process that never calls upon a national majority to confront its actual exercise.

Not surprisingly, this Court has firmly rejected the argument that Congress may authorize the states to enact a caste system for newcomers. In *Shapiro*, this Court directly rejected the argument that a federal law, which directed the Secretary of Health, Education and Welfare "not to disapprove [state welfare] plans submitted by the States because they include[d]" waiting periods for receipt of benefits, *id.* at 639, insulated state durational residency requirements from constitutional attack. Instead, the Court held that "Congress may not authorize the States to violate the Equal Protection Clause." *Id.* at 641; *see Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966) ("We emphasize that Congress' power under § 5 [of the Fourteenth Amendment] is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732-33 (1982). Congress's adoption of the PRWORA thus cannot save section 11450.03 from unconstitutionality.[23]

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22. The closest analogy is to the non-delegation doctrine. Congress's decision to grant standardless discretion to a decision-maker does not automatically vest the decision-maker with majoritarian legitimacy. *See, e.g., Loving v. United States*, 517 U.S. 748, 758-59 (1996); *Weiss v. United States*, 510 U.S. 163, 189 n.5 (1994) (Souter, J., concurring); *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 672-76 (1980) (Rehnquist, J., concurring in the judgment); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537-42 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 420-30 (1935); *cf. Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122, 125 (1982) (limiting ability of state government to delegate authority).

23. Congress's inability to validate state action that violates the Equal Protection Clause contrasts with its power to authorize state action that would otherwise violate the dormant Commerce Clause. *See supra* note 8.

Moreover, where, as here, critically important rights of national citizenship are at stake, Congress may not delegate to local majorities the power to dilute those rights. One of the most important privileges and immunities of national citizenship is the ability to migrate from one state to another in search of work. *See Zobel*, 457 U.S. at 76-77 (O'Connor, J., concurring). Congress may not authorize states to deprive newcomers of this essential right of national citizenship.

Finally, viewed from the perspective of national citizenship, no group is more vulnerable nor less likely to form enduring ties with the political majority than those who are forced to exercise their right to interstate travel in order to escape from poverty and secure a better life elsewhere. While such persons are not a suspect class for Equal Protection purposes, *see Harris v. McRae*, 448 U.S. 297, 323 (1980), their precarious status does cast doubt on the validity of a Congressional judgment to consign their fate to local majorities that have strong economic incentives to deter their migration.[24]

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24. Of course, were Congress to mandate that the states enact two-tier durational residency requirements, such a provision would burden the right to travel and should be invalidated pursuant to strict judicial scrutiny. *See Shapiro*, 394 U.S. at 641-42.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to strictly scrutinize California's one-year durational residency requirement for full welfare benefits and affirm the decision below preliminarily enjoining section 11450.03.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1998

ELOISE ANDERSON, *et al.*,
Petitioners,

v.

BRENDA ROE and ANNA DOE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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IN THE

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BRIEF OF AMICUS CURIAE THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

The American Bar Association (ABA) is the leading national membership organization for the legal profession with more than 400,000 members across the United States.[1] "The

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[1]In accordance with Rule 37 of the rules of this Court, *amicus curiae* the American Bar Association hereby certifies that this brief is filed with the

purposes of the Association are to uphold and defend the Constitution of the United States, . . . [and] to apply the knowledge and experience of the profession to the promotion of the public good." American Bar Ass'n, *ABA Constitution and Bylaws: Rules of Procedure*, House of Delegates, Art. 1, § 1.2 (1994-95).

This case implicates the ABA's long-held concern for the well-being of children and families living in poverty. The ABA has expressed this concern by creating the Center on Children and the Law, the Steering Committee on the Unmet Legal Needs of Children, and the Commission on Homelessness and Poverty. In recent years, the ABA has produced two reports on the difficulties facing children, including American Bar Association Presidential Working Group on the Unmet Legal Needs of Children and their Families, *America's Children at Risk, A National Agenda for Legal Action* (July 1993) [hereinafter *"Children at Risk"*], its "landmark" report on the unmet legal needs of children. *See also* American Bar Ass'n Steering Comm. on the Unmet Legal Needs of Children, *The Impact of Domestic Violence on Children* (1994). Among other recommendations, that report called for "[t]he organized bar [to] seek improvements in the AFDC program . . . and [to] work to defeat any proposed

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consent of both parties to this action. *Amicus* also certifies that no counsel for a party authored this brief in whole or part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

changes that penalize recipients." *Children at Risk, supra*, at 12.

The ABA also has expressed specific concern about durational residency requirements. In part as a result of its view that "[t]he express purpose of discriminating against newcomers is constitutionally impermissible," *id.* at 5, and its understanding that "benefit levels are tailored to the cost of living in [each] jurisdiction, and . . . no benefits in any state in the nation are sufficiently generous to lift a family above the poverty line," *id.* at 4, the House of Delegates resolved "[t]hat the American Bar Association opposes linking public assistance for needy persons to requirements which infringe on the right of privacy and on other individual freedoms, such as the right to travel." *Children at Risk, supra*, at 87. The Association believes that its experience with these issues will allow it to make a substantial contribution to the Court's consideration of this case.

STATEMENT

This case involves a constitutional challenge to California Welfare and Institutions Code § 11450.03, which limits the level of welfare benefits available to new California residents during their first year in the State. During that first year, the statute limits cash benefits to the level provided by the state from which an individual has moved. As a result, many new residents would receive benefits that are only a fraction of those paid to other Californians in comparable financial circumstances. This is true despite the fact that the cost of living in California is among the highest of any state.

Respondents Brenda Roe and Anna Doe are two recently arrived residents of California who were threatened with

feeling the effects of the California statute. Roe moved to California with her husband who could not leave her side and therefore could not work because she developed complications with her pregnancy. She was informed that her grant level would be reduced from $565 per month to the Oklahoma level of $307. Pet'r App. 19. Doe moved to California while pregnant, obtained a job but was forced to quit because it was too stressful, and applied for welfare benefits. She was informed her benefits would be reduced from $456 per month to the District of Columbia level of $330. Pet'r App. 19-20.

Respondents brought suit in federal court, and the court preliminarily enjoined implementation of section 11450.03. The Ninth Circuit affirmed.

SUMMARY OF ARGUMENT

1. Under this Court's decisions in *Shapiro v. Thompson*, 394 U.S. 618 (1969), *Dunn v. Blumstein*, 405 U.S. 330 (1972) and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), it is well established that strict constitutional scrutiny is required when states draw distinctions among their own residents based on duration of residency, at least where those distinctions affect the ability of new residents to exercise fundamental rights or to receive the basic necessities of life. In each of those cases, the Court compared the treatment accorded to new and old residents of the same state, and found no sufficient justification for invidious distinctions between those groups. In particular, it rejected the argument that durational residency requirements were justified to prevent needy persons in other states from having an undue incentive to move into the defendant state or to make it more palatable politically to maintain overall benefit levels at a higher level.

More recently, in *Zobel v. Williams*, 457 U.S. 55 (1982), *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), and *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986), the Court did not need to reach the question whether strict scrutiny was applicable to laws that also drew distinctions based on duration of residency in the state but affected less substantial rights and interests. It invalidated those laws under rational basis scrutiny, holding that there is no legitimate interest in rewarding long-term state residents for their past contributions to the state.

Applying this "right to travel" case law here, it is clear that strict scrutiny applies to California's law drastically limiting welfare benefits available to some new state residents. Moreover, because the State's defense of the statute adds little to the arguments previously rejected, that statute plainly should be held invalid. In particular, the notion that California's treatment of new residents is properly compared, for constitutional purposes, to the treatment they would have received in their former states reflects a fundamental misunderstanding of this Court's jurisprudence.

2. The fact that Congress, after the enactment of the California law, purported to authorize states to limit the welfare benefits provided to residents during their first year in the state is constitutionally irrelevant. Any federal interests that may be served by such a limitation would not change the level of constitutional scrutiny properly accorded to California's statute. Indeed, it is clear that Congress lacks the power to authorize states to enact laws that would otherwise violate the "right to travel."

In any event, close examination of the supposed federal interests enunciated in the brief of the United States as *amicus*

curiae reveals that they are entitled to little weight. In the main, they amount to new ways of saying that there is a legitimate interest in limiting benefits to new state residents because of fear that a given state will become a "welfare magnet." This Court has already firmly rejected that notion, and it fares no better in a new federal form. Other than that, the United States offers only vague suggestions that laws like the one at issue here serve as valid "choice of law" provisions. Whatever this may mean, it hardly serves to overcome the constitutional problems raised when states draw distinctions among their own residents, based on duration of residency, in the distribution of benefits needed for the basic necessities of life.

ARGUMENT

California's restriction of welfare benefits for new residents clearly violates the Constitution. Under California Welfare & Institutions Code § 11450.03, one class of needy Californians would be denied equal access to basic necessities of life made available to other needy Californians, solely because the first class has exercised its right to travel and taken up residency in the state within the previous twelve months. Clearly established law mandates that the state have a compelling justification for such discrimination. Rather than offer such a justification, California attempts to distinguish its case from prior cases, arguing that legislation that discriminates against new state residents need only be rationally related to a legitimate state interest to be constitutionally permissible where the state's treatment is equivalent to what the individuals would have received in their former home states. This approach fundamentally misconceives the concerns that have animated

this Court's "right to travel" decisions.[2] Moreover, the fact that Congress, in welfare reform legislation passed subsequent to the enactment of the California statute here at issue, purported to authorize differential treatment of welfare applicants during their initial twelve-month period of residence in a state alters neither the applicable standard of review nor the substantive outcome of this case.

I. THIS COURT'S DECISIONS REQUIRE INVALIDATION OF THE CALIFORNIA LAW.

A. The *Shapiro* Doctrine.

In *Shapiro v. Thompson*, 394 U.S. 618 (1969), and its progeny -- *Dunn v. Blumstein*, 405 U.S. 330 (1972) and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) -- this Court established that laws selectively denying fundamental rights or critical benefits to persons who have recently exercised their right to move from one state to another must be narrowly tailored to promote a compelling state interest. The same strict scrutiny is properly applied to the statute at issue here. Moreover, under that standard -- indeed, even under rational basis scrutiny -- California's limitation of welfare assistance for new residents should plainly be held invalid.

The three state laws challenged in *Shapiro* barred all welfare payments to new residents for one year, thus creating

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[2]Petitioners' rationale is no more compelling today than it was in 1994, when this court dismissed as unripe a case involving a constitutional challenge to the identical California statute. Amicus American Bar Association respectfully refers this Court to its brief in that case, *Anderson v. Green*, No. 94-197, *cert. granted*, 513 U.S. 922 (1994), *dismissed as unripe*, 513 U.S. 557 (1995).

"two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction." 394 U.S. at 627.[3] Recognizing that the restriction would severely impact interstate migration by indigents, a constitutionally protected right, the Court required the state to show a compelling state interest.[4] Reasoning that a state may not set out to deter the exercise of a constitutional right, the court declared the asserted purpose of "deterring the in-migration of indigents" to be "constitutionally impermissible." *Id.* at 631. It also rejected as illegitimate any state attempt to "fence out those indigents who seek higher welfare benefits," *id.*, or to categorize citizens, in the distribution of public benefits, on the basis of "contributions" previously made to the state, *see id.* at 632. Finally, although accepting the legitimacy of fiscal concerns as a general matter, the Court held that "saving of welfare costs cannot justify an otherwise invidious classification." *Id.* at 633.[5]

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[3]The Connecticut statute invalidated in *Shapiro* was in one key respect *narrower* than the California statute here at issue, as it contained exceptions permitting new residents to receive benefits immediately if they met certain criteria indicating that they had not established residency in the state for the purpose of obtaining public assistance. *See Shapiro*, 394 U.S. at 622 n.2.

[4]*See also Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 906 n.6 (1986) (plurality opinion) ("[W]here a law classifies in such a way as to infringe constitutionally protected fundamental rights, heightened scrutiny under the Equal Protection Clause is required.") (citing other authorities).

[5]*See also Maricopa County*, 415 U.S. at 263 ("appellees must do more than show that denying free medical care to new residents saves money").

Applying the rationale of *Shapiro*, the Court subsequently invalidated laws that barred new residents from voting (*Dunn v. Blumstein*) and from receiving free nonemergency medical care for indigents (*Maricopa County*). As in *Shapiro* itself, the Court reached its conclusion in these cases after finding the treatment of new residents to be inferior to the treatment of otherwise identical long-term residents *of the same state*. In *Maricopa County*, for example, the Court, in concluding that the plaintiff was immediately entitled to the full benefit of the free medical care available to similarly situated long-term residents of his new Arizona county of residence, did not even discuss whether the plaintiff's former home state of New Mexico offered *any* medical care.[6] Rather, the Court compared new and old residents' rights, holding that "the right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents." *Maricopa County*, 415 U.S. at 261.

Since *Maricopa County*, the Court has not considered a case involving discrimination against new residents with respect to basic necessities or fundamental rights. However, in cases involving discrimination with respect to less important benefits, the Court has continued to insist that there is no legitimate interest in favoring long-term residents *per se*, and has therefore invalidated the laws at issue in these cases as failing to survive even rational-basis scrutiny. *See Zobel v. Williams*, 457 U.S. 55 (1982) (invalidating an Alaska statute which distributed cash dividends from development of the state's natural resources based on length of residence); *Hooper*

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[6] Petitioners' assertion that the plaintiff did enjoy such a right in his former state, Pet'r Br. at 6, finds no support in any of the published opinions in that case.

v. Bernalillo County Assessor, 472 U.S. 612 (1985) (rejecting exemption from property tax that applied only to Vietnam veterans who were state residents before 1976); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986) (overturning civil service preference awarded only to veterans who were New York residents when they entered the armed forces).[7]

This Court's precedents thus clearly indicate that a state may not, without very good justification, differentiate among its own residents based on the fact that some of them have recently exercised their right to travel. Where such discrimination affects a person's fundamental rights or basic needs (the deprivation of which has long been recognized to threaten severe hardship, even in the short term[8]), the state must

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[7]In *Zobel v. Williams*, 457 U.S. 55 (1982), for example, the Court held that the State of Alaska's justification for its scheme of distributing dividends from the exploitation of the state's natural resources -- in amounts that varied based on length of residency in the state -- failed rational basis review, thus not requiring the court to determine whether stricter scrutiny would have been warranted. *Id.* at 63. The Court noted that the rationale of rewarding contributions to the state made by residents in the past would be impossible to cabin to the context of cash dividends, "open[ing] the door to state apportionment of other rights, benefits, and services according to length of residency,"and "permit[ting] the states to divide citizens into expanding numbers of permanent classes." *Id.* at 64.

[8]*See, e.g. Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (suspension of welfare benefits "pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits"); *Mathews v. Eldridge*, 424 U.S. 319, 340-343 (1976) (finding hardship from temporary cessation of disability benefits to be less severe than that in *Goldberg* as eligibility was not based on need; court assumed that other need-based assistance would be available). Indeed, California's own courts have recognized that the gravity of the hardship that loss of welfare benefits can cause necessitates special consideration, noting that

supply a compelling justification for providing them on a basis that differentiates among classes of citizens distinguishable only by the length of their bona fide residency in the state.

B. The California Statute Is Clearly Invalid Under the Existing Precedent.

There can be little doubt that the California statute falls squarely within the category of legislation requiring strict scrutiny under the existing case law. Like the statute in *Shapiro*, California Welfare & Institutions Code § 11450.03 creates two classes of needy citizens in California, identical in all respects except the duration of their residency. The only difference is that, here, the disfavored group is not entirely denied benefits; it is instead given lower benefits that in many instances would be grossly insufficient to match the cost of living in California.

Moreover, nothing offered as a justification by the state suggests that its law could survive constitutional scrutiny. The legislative goals that California claims to be pursuing are, at bottom, indistinguishable from those rejected as insufficient justifications in the *Shapiro* line of cases. Thus, although California describes its purposes as "reducing state expenditures and aiding in welfare reform," Pet'r Br. at 26, it admits a desire to avoid becoming a "welfare magnet," *id.* at 8 -- a goal no different from the desire to discourage indigent persons from migrating to the new state in search of better welfare benefits that the *Shapiro* court found to be constitutionally impermissible.

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residency requirements for welfare benefits "could cause great suffering and even loss of life." *Kirk v. Board of Regents*, 273 Cal. App. 2d 430, 440 (1969), *quoted in Maricopa County*, 415 U.S. at 260 n.15.

Certainly, California's reference to saving money on welfare cannot save a statute that relies on an invidious classification to effectuate that purpose. But here, that is precisely what the state is arguing. It attempts to divorce the cost justification from the goal of discouraging migration, but that effort rings hollow because there is no indication that new California residents are more likely than old to require welfare assistance at all, or in greater amounts, or to be better suited to subsist on a reduced amount of assistance than longer-established residents, and the total cost savings achieved by subjecting them to a one-year disability could be achieved by a unilateral reduction of welfare benefits to all participants of less than one dollar per month. *See* Pet'r App. 31 & n.20; Br. in Opp'n at 8. Thus, the main cost savings effected by the statute (if any) would come, not directly through reduction in certain residents' benefits, but indirectly through successful persuasion of economically vulnerable persons in other states not to move to California in the first place.

Under the case law, a law that divides classes of state residents based on duration of residency cannot survive so much as rational basis review, let alone the higher burden of compelling justification required for a statute that implicates the constitutional right to travel. *See Hooper v. Bernalillo County Assessor*, 472 U.S. at 623 ("The State may not favor established residents over new residents based on the view that the State may take care of 'its own,' if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, become the State's 'own' and may not be discriminated against solely on the basis of their arrival in the State after May 8, 1976.")

In *Shapiro, Dunn*, and *Maricopa County*, the Court described the flaw in the laws there invalidated by stating that

the restrictions "penalize" or "impinge" the right to travel. *See, e.g., Shapiro*, 394 U.S. at 634 ("penalize"); *id.* at 638 ("touches on"); *id.* at 644 (Stewart, J., concurring) ("impinge"); *Dunn*, 405 U.S. at 339 ("penalize"); *Maricopa County*, 415 U.S. at 256 ("penalized"); *id.* at 262 n.21 ("impinge"); *id.* at 269 ("impinge"). California now argues that "penalty" analysis necessitates a comparison between the benefits received by a person before and after moving to California. But that conception of "penalty" was flatly rejected in *Dunn*, where the Court indicated that a comparison of a single individual's rights in two different states did *not* implicate the right to travel, so long as his treatment was comparable to that of his new neighbors. *See Dunn*, 403 U.S. at 342 n.12 ("Where . . . an interstate migrant loses his driver's license because the new State has a higher age requirement, . . . the new State's age requirement is not a *penalty* imposed solely because the newcomer is a new resident; instead, all residents old and new, must be of a prescribed age to drive.") Indeed, petitioners themselves declare that "[d]ifferences between states, even though at times major, do not penalize the right to travel." Pet'r Br. at 20-21. Rather, it is differences *within a state* in the treatment of persons identical in all relevant respects except for duration of state residency that "penalize" some persons for having exercised their right to travel and thus are highly suspect under the Constitution.

Thus, California's penalty argument relies on a confusion between two distinct evils caused by a state's differential treatment of its own citizens on the basis of the duration of their residency. One possible evil is actual deterrence of interstate travel. *See Maricopa County*, 415 U.S. at 256-57; *Dunn*, 405 U.S. at 339; *Shapiro*, 394 U.S. at 629. The other is discrimination affecting persons who have *already* exercised their right to travel, as compared to those who have not, *within*

and by the state creating this distinction. Maricopa County, 415 U.S. at 256-57; *Dunn*, 405 U.S. at 339-40.[9] In many cases, probably including this one, the constitutional injury comes predominantly not from deterrence but from discrimination. Petitioners' misapprehension of this distinction is apparent in their argument that "existing California residents are, by definition, not impacted by section 11450.03 since any decision to travel to California has already been made," Pet'r Br. at 24. In reality, *only* California residents are governed by section 11450.03; the State has no jurisdiction over people, indigent or not, who reside in other states. And California acts with regard to all of its residents in the area of welfare; the salient question is how it treats those who have exercised their right to travel within the last twelve months as opposed to those who have been established for a year or more.

In *Dunn*, furthermore, the Court emphasized that strict scrutiny review was compelled by either of two independent

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[9]This dual aspect of the right to travel has been affirmed in the cases in which the Court found it unnecessary to apply more than rational basis review to invalidate a state enactment. In *Soto-Lopez*, where the plurality in fact did apply strict scrutiny, the Court reaffirmed that "[a] state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses 'any classification which serves to penalize the exercise of that right.'" *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (citations omitted). It found that a state statute granting civil service preferences only to veterans who had been New York residents at the time of their enlistment in the armed forces did inflict such a penalty. *See also Zobel*, 457 U.S. at 60 n.6 ("In addition to protecting persons against the erection of actual barriers to interstate movement, the right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents. In reality, right to travel analysis refers to little more than a particular application of equal protection analysis.")

factors: "the basis for the classification (recent interstate travel)" *or* "the benefit withheld by the classification" – in that case, "the opportunity to vote." 405 U.S. at 335. As demonstrated above, the California statute classifies welfare-eligible residents on the basis of recent interstate travel, and for that reason alone must be subject to strict scrutiny under the *Shapiro* line of cases. But the nature of the benefit affected here also strengthens the conclusion that a compelling justification must be made. Like the statute in *Shapiro* itself, the California welfare restriction affects the opportunity to obtain basic necessities of life. The State has chosen to adopt a benefits formula keyed to the cost of living, *see* Cal. Welfare & Inst. Code § 11452. Moreover, substantial empirical evidence, including the specific facts regarding the named plaintiffs in this action, indicates that differentials in cost of living among states will place recent migrants to California receiving the lower cash benefits of their former home states at a substantial disadvantage in comparison to long-term California residents who are on welfare, and in absolute terms, will likely result in homelessness and other very concrete human costs. *See* Pet'r App. 21-24 (describing evidence adduced); Br. in Opp'n at 8-9. Even though the Court has not attempted to define all of the parameters of the "penalty" analysis, in *Maricopa County*, it reaffirmed that providing basic necessities of life to a state's citizens on unequal terms determined solely by reference to duration of residency was such an unjustifiable penalty. *Maricopa County*, 415 U.S., at 259. This case falls squarely within that holding.[10]

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[10]In practical application, the California law is even more odious than a residency requirement creating a dual set of laws, applying differently to old citizens and new. By purporting to apply to a new resident a part of the law of his former home, it creates not a dual standard, but a multi tiered one, as the variations in benefits available under other states' laws will mean that new residents are not even comparably positioned with respect

Petitioners nevertheless argue that welfare is not itself a constitutional right, placing heavy reliance on *Dandridge v. Williams*, 397 U.S. 471 (1970). But the lack of a constitutional right to welfare has no relevance to the constitutional analysis in this case.[11] In fact, the rationale on which the United States and California both rely to justify the law -- the need to secure a state against the possibility of becoming a welfare magnet by some means that will not encourage a "race to the bottom" in the provision of benefits -- would make absolutely no sense if there were a direct constitutional right to welfare benefits, as the states would be constitutionally prohibited from undercutting this right, regardless of whether the criterion chosen to differentiate among recipients impinged an independent constitutional right. Of all of the Court's right to travel cases, only in *Dunn* did the residency requirements abridge a constitutional right separate from the right to travel and equal protection; leaving welfare aside, the fact that states were clearly not obligated to provide special veterans benefits,

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to one another.

[11]California does not deny that the plaintiffs are generally eligible for welfare under its own statutory welfare scheme, see Pet'r Br. at 20, a scheme that the legislature has designed to ensure minimal subsistence to its residents, using a baseline for calculation of relief determined in relation to the standard of living. See Cal. Welfare & Inst. Code § 11452. Having made this legislative judgment, it cannot apply a different formulation to the relief offered to one class of needy citizens because they have recently exercised their right to interstate travel. *Dandridge* itself recognizes that any classification by the state in the provision of welfare benefits "may not, of course, impose a regime of invidious discrimination," 397 U.S. at 483. *Shapiro* indicated that to draw a line based on the date of establishing residency in a state is to practice invidious discrimination. *See Shapiro v. Thompson*, 394 U.S. at 633. Hence, it is clear why, as in *Maricopa County*, the California law must be subject to strict scrutiny. *See Maricopa County*, 415 U.S. at 262 n. 21 (distinguishing *Dandridge*).

as in *Hooper* and *Soto-Lopez*, or direct cash dividends, as in *Zobel*, did not save those laws from invalidation where the state, having determined to provide such a benefit to its citizens, attempted to do so on a differential basis to classes distinguished solely by relation to the timing of the citizen's association with the state. California offers no reason why basing its money-saving measures on the length of a recipient's citizenship in the state is any less irrational than the measures invalidated in any of these cases.

The foregoing analysis demonstrates not only that California's law cannot withstand the strict scrutiny that is properly applied to laws restricting access to basic necessities for persons who have exercised their right to interstate travel, but also that the California law cannot pass even rational basis review. Hence this Court should sustain the District Court's preliminary injunction.

II. THE FACT THAT CONGRESS HAS AUTHORIZED STATES TO INSTITUTE DIFFERENTIAL TREATMENT ON THE BASIS OF DURATION OF RESIDENCY IS CONSTITUTIONALLY IRRELEVANT.

There is no reason to alter the Court's approach to this case based on the fact that Congress has purported to authorize laws like the one at issue here. Under 42 U.S.C. § 604(c), a part of the package of welfare reforms passed by Congress in 1996, states are authorized to "apply to a family the rules (including benefits amounts)" applicable in the family's former state of residence during the family's first twelve months of residency in a new state. As a result, the United States urges this Court to evaluate the law under different criteria. In so doing, however, the United States acknowledges that important

constitutional rights are implicated by the California statute and that the law must therefore be subjected to a review more searching than rational basis -- *i.e.*, "intermediate" scrutiny. U.S. Br. at 10. Indeed, the federal government does not seek to overturn *Shapiro, id.* at 9, 22, and does not express confidence in the validity of the specific California statute here in issue, *id.* at 8 (advocating sustaining preliminary injunction); *id.* at 10 (expressing doubt about statute's validity given its enactment prior to federal authorization and "its apparent overbreadth in relation to the relevant federal purposes"). Given these concessions, it is apparent that the enactment of the federal statute, allegedly "authorizing" California's pre-existing statute, alters neither the applicable standard of review nor the substantive outcome of this case.

A. No Potential Federal Interest Should Affect the Applicable Standard of Review.

The government's argument for departing from the established constitutional framework and applying intermediate scrutiny here is murky. The United States explains that "[t]he premise for applying that test here is that Congress has specifically authorized a general type of state classification, and we think it clear that the goals of the congressional authorization . . . are important ones. Thus, if the state statute implements the federal authorization, then the dispositive question will be whether the particular form of implementation selected by California is 'substantially related' to those federal purposes." U.S. Br. at 10.

But regardless of the assumed strength of the federal interests motivating the passage of 42 U.S.C. § 604(c), it is impossible to describe the California law here challenged as being created to "implement" the federal enactment, as it was

passed four years prior to Congress's actions. The United States itself acknowledges this awkwardness. U.S. Br. at 10. For this reason alone, it is wholly inappropriate to alter the standards of review applicable to this particular statute.

In any event, the United States' argument regarding the standard of review also has more fundamental flaws. First, to the extent that the United States suggests that the government's *interest* determines the *standard* of constitutional review, it clearly gets the analysis backwards. Where the rights of the individual under the Constitution are at issue, the standard of review is dictated by the implicated right and the disputed law's impact on it[12] -- not by the justifications offered.

Indeed, the United States at times acknowledges that the federal government may not itself abridge personal constitutional rights including the rights to travel and equal protection, as embodied in the Fifth Amendment. U.S. Br. at 9, 24; *see Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) (holding that equal protection analysis under Fifth Amendment is same as under Fourteenth Amendment); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 277 n.7 (1993) ("the individual right of interstate travel" may not be "eliminated by Congress"); *Shapiro*, 394 U.S. at 641-42 (invalidating on Fifth Amendment grounds District of Columbia statute imposing durational residency requirements). It also disclaims the notion that Congress may authorize the states to accomplish indirectly what Congress is itself

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[12]Indeed, if the standard of review were determined by looking first at the government's interest, it is unclear whether this rule would work for or against the government. One might argue that weak state interests should be subjected only to rational basis review, or that weak interests would properly invoke courts' skepticism, and hence strict scrutiny.

constitutionally prohibited from doing. U.S. Br. at 9; *see Shapiro*, 394 U.S. at 641 ("Congress may not authorize the States to violate the Equal Protection Clause."); *cf. Edwards v. California*, 314 U.S. 160, 177 (1941) (Douglas, J., concurring) (the free migration of United States citizens from one state to another "occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal," which is subject to congressional regulation under the Commerce Clause).

Instead, the United States seeks to enunciate several *federal* interests that it then attempts to use to buttress the potential constitutionality of *state* laws limiting welfare benefits for new residents. But this Court already rejected such a convoluted constitutional analysis in *Shapiro*. There, assuming that the challenged state statutes were authorized, but not mandated, by the federal welfare statute, the Court held it "is therefore not that statute but only the state requirements which pose the constitutional question." 394 U.S. at 641. The *Shapiro* Court went on to state that if the federal statute itself were "somehow at issue here, it follows from what we have said that the provision, insofar as it permits the one-year waiting-period requirement, would be unconstitutional." 394 U.S. at 641; *see also id.* at 641-42 (invalidating District of Columbia statute under Fifth Amendment).

In any event, as we make clear in the next section, the federal interests asserted by the United States, even assuming they are relevant to the issues before this Court, do not substantially affect the constitutional problems raised by the California statute.

B. The Asserted Federal Interests Do Not Alter the Calculus Here.

The United States asserts that because of the national scope of the interests of Congress, the purposes it attributes to the federal enactment "are plainly legitimate, even though it may be doubted that an individual State, pursuing only its own interest, would ever have valid reasons for distinguishing new citizens from old in allocating benefits under a program designed and funded solely by the State." U.S. Br. at 20. The federal purposes that the United States posits are (1) "avoiding the creation, through a federal program, of distorted incentives for interstate migration for benefit recipients"; (2) "addressing the unique choice-of-law considerations that may reasonably be deemed to arise when a participant in one State's implementation of the federal program moves to another State with different rules"; and (3) "mitigating any tendency, in such a program, toward a 'race to the bottom' in the State-by-State establishment of benefit levels." *Id.* These suggested interests, when examined carefully, amount to less than might at first appear.

The first of these asserted interests, "avoiding the creation . . . of distorted incentives for interstate migration," *id.*, is simply another way of stating the "welfare magnet" argument. The government suggests that states should be permitted to discourage indigent persons from migrating into a state for the purpose of availing themselves of that state's welfare benefits. But this motive was squarely rejected in *Shapiro*. *See* 394 U.S. at 631-32. Making this interest a supposedly national one does not legitimize it. In our federal system, states always provide different types and levels of taxes and benefits, which may be, indeed often are, a consideration in a citizen's decision to

relocate; indeed, diversity among the states has been lauded as "mak[ing] government more responsive by putting States in competition for a mobile citizenry." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). As Justice Brennan explained in his concurrence in *Zobel*:

> a State may make residence within its boundaries more attractive by offering direct benefits to its citizens in the form of public services, lower taxes than other States offer, or direct distributions of its munificence. . . . That is a healthy form of rivalry: It inheres in the very idea of maintaining the States as independent sovereigns within a large framework, and it is fully -- indeed, necessarily -- consistent with the Framers' further idea of joining these independent sovereigns into a single Nation.

457 U.S. at 67-68 (Brennan, J. concurring). *See also id.* at 76-77 (O'Connor, J., concurring in judgment); *Shapiro*, 394 U.S. at 632; *Maricopa County*, 415 U.S. at 264. If the United States is correct that avoiding "distorted" incentives for interstate migration justifies the institution of durational residency requirements, Congress may by simple enactment destroy the careful balance between state diversity and equality among national citizens on which the federal system rests: A congressional determination that the decision to move in pursuit of better schools, lower taxes, or any other government service indicates "distorted" incentives would permit states to limit or deny these benefits to their new citizens, placing state

citizenship above national.[13] This outcome is inconsistent not only with the right to travel, but the very fabric of our union.

The United States' third-stated interest is intimately related to the first, and is just as illegitimate.[14] The United States posits that Congress authorized the States to impose durational residency limitations on welfare benefits in order to give the States assurance that they had a mechanism to offset their attractiveness as "welfare magnets" if they introduced innovative practices, thereby reducing the tendency for states to "race to the bottom" out of fear of attracting indigent persons. Although Congress's intent, under this theory, is benevolent, it cannot save the individual state laws establishing these differential requirements on the basis of residency. Essentially this same argument was rejected in *Maricopa County*:

> It is suggested that whether or not the durational residence requirement actually deters migration, the voters think that it protects them from low income families' being attracted by the county hospital; hence

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[13]This Court has previously affirmed that reasoning applicable to welfare benefits would also apply to other governmental programs. *See Shapiro*, 394 U.S. at 632-33 (rejecting rationale for durational residency requirement for welfare, as it "would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection").

[14]In fact, this interest might simply be a restatement of the interest in preventing the creation of "welfare magnets," in which case it is illegitimate for the reasons stated above. The following discussion is based on the understanding that the United States intends a subtly different interest -- not a direct interest in preventing states from in fact becoming welfare magnets, but rather an interest in preventing states from diminishing their services to avoid this threat, whether real or perceived.

> the requirement is necessary for public support of that medical facility. A State may not employ an invidious discrimination to sustain the political viability of its programs. As we observed in *Shapiro*, "[p]erhaps Congress could induce wider state participation in school construction if it authorized the use of joint funds for the building of segregated schools," but that purpose would not sustain such a scheme.

415 U.S. at 266-67 (citations omitted).

The point made in *Maricopa* is one manifestation of the broader principle that government may not validate private prejudices, even if its own motives are to shield the disadvantaged from the effects of that prejudice. *Cf. Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (reversing state court decision altering child custody because of concern that child would suffer from prejudice due to custodial mother's remarriage to person of a different race) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.") Congress may not validate the States' fears of attracting the indigent by offering them the option of defending against this perceived threat by discriminating against a class of citizens on the basis of the duration of their residency, even if Congress does so to combat the perceived risk that the states will otherwise homogenize their programs so as to reduce the purported attractions. To the contrary, if Congress wishes to ensure that States provide at least minimal care for their indigent residents, it must do so in ways that will not implicate equal protection and the right to

travel, such as by establishing minimum benefit requirements.[15] *Cf. Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490-91 (1995) (purpose of discouraging alcohol "strength wars" did not justify restriction on truthful labeling of alcohol content of beers, as Congress could accomplish same end by regulations not implicating constitutional rights, such as direct regulation of alcohol content).

Finally, although the United States repeatedly refers to the Congressional authorization in 42 U.S.C. § 604(c) as a "choice of law" rule, it does not elaborate on what it means by this or why such a rule is required, let alone constitutionally justified, other than to allude vaguely to "unique . . . considerations" that may "reasonably be deemed to arise when a participant in one State's implementation of the federal program moves to another State with different rules." U.S. Br. at 20. Whatever overall principle the United States may intend to indicate by this mysterious "choice of law" notion, it is clearly inappropriate to attribute this purpose to the law passed by the state of California, which did not suggest such a purpose in adopting the law and has not subsequently attempted to ratify it.

Nor could California convincingly do so, for several reasons. First, the notion of a conflict of laws necessitating special "choice" provisions could become germane only in situations where individuals are potentially eligible for welfare assistance from two states at the same time. But the California law is not limited in its impact to persons who previously had been receiving any sort of public assistance in their prior state. *See* Pet'r App. 18 (quoting implementation instructions for §

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[15]Such requirements need not hamper creative efforts in the states, as "minimum" standards can be defined in a variety of ways.

11450.03, issued to counties by the California Department of Social Services, which state that in applying restriction, "it does not matter if a family was on aid in the former state."). Nor does it, by its very nature, serve to separate out a class of persons properly assisted by states other than California. The statute merely adjusts the benefits provided to two classes of *California* residents.

Indeed, it would be fatuous to suggest that there is a substantial choice of law problem in the welfare field. Where a person leaves one state, and becomes subject to the laws of a new state, there is generally no conflict regarding the law governing his current conduct.[16] Nor is there any doubt about which state is properly responsible to provide any assistance that the person may need, up to the level the state deems appropriate for all of its residents. That is all the plaintiffs in this case have asked California to do.

In sum, the federal interests suggested by the United States add little to the constitutional analysis in this case. That stark reality, combined with the United States' frank concessions that the California law requires some form of searching scrutiny and appears "overbroad," should serve to reinforce the conclusion that the courts below acted fully appropriately in enjoining the implementation of section 11450.03.

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[16]Because California has agreed to pay respondents benefits as California residents -- albeit at a lower level -- it cannot and does not rely on the argument that its law serves to verify residency in the state. *Cf. Califano v. Aznavorian*, 439 U.S. 170, 178 (1978) (law terminating benefits 30 days after recipients leave the country justified based on the likelihood that recipient no longer a bona fide U.S. resident).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ELOISE ANDERSON, *et al.*,
Petitioners,
v.
BRENDA ROE AND ANNA DOE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amicus curiae will address the following question:

Whether a State may enact a law that penalizes the exercise of the right to interstate migration by substantially limiting the TANF benefits available to new residents for basic subsistence.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ELOISE ANDERSON, *et al.*,
Petitioners,
v.
BRENDA ROE AND ANNA DOE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The National Law Center on Homelessness and Poverty is a not-for-profit organization based in Washington, D.C., established to address issues related to homelessness and poverty at the national level.[1] Poor and homeless people are frequently without effective political voice or power. The Center works with groups throughout the country to ensure that the constitutional and statutory rights of homeless families and individuals are protected and that laws are not selectively enforced against them. The Center also works with federal, state and local policymakers to develop constructive policies to

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

help homeless persons out of poverty and into self-sufficiency. Recently, the impact of welfare reform on poor and homeless families has been a focus of the Center's work. The Center and its counsel have extensive experience with federal constitutional questions affecting homeless people and the First, Fifth and Fourteenth Amendments, and believes that they can offer expertise that will be helpful to the Court.

STATEMENT

Approximately two million Americans experience homelessness annually.[2] Among the homeless population, families with children are the fastest-growing subgroup: overall, children now make up 25% of the homeless population. U. S. Conference of Mayors, *A Status Report on Hunger and Homelessness in America's Cities* (1997). Major causes of family homelessness include extremely low incomes coupled with high housing costs. *Id.* Income assistance programs -- and in particular the adequacy of the benefit levels to meet housing costs in a particular community -- are critical both in preventing homelessness and in helping homeless persons into self-sufficiency. *Id.* at 82-87.

Inadequate benefit levels can lead directly to homelessness. Studies in states that reduced or eliminated their welfare benefits for single individuals found that the result was homelessness for a significant percentage of recipients or former

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[2] Martha Burt, *Critical Factors in Counting the Homeless*, 65 Am. J. Orthopsychiatry 334 (1995); James D. Wright & Joel A. Devine, *Housing Dynamics of the Homeless: Implications for a Count*, 65 Am. J. Orthopsychiatry 320 (1995).

recipients.[3] For families who are already homeless, adequate benefits are essential to their ability to move into housing. Further, the success of efforts to move recipients into work depend to a large extent on the adequacy of benefits to meet housing costs: without stable housing, it is extremely difficult for homeless families to obtain and maintain employment.[4]

Housing costs -- perhaps more than any other basic living cost -- vary dramatically across the country. Housing costs in California are among the highest in the nation. For example, for a two bedroom apartment in Los Angeles, the fair market rent (an indicator set by the federal government) is $737; in San Francisco it is $987.[5] The California TANF benefit for a family of four, set at $673, is alone insufficient to afford housing in the absence of other income or assistance.[6] For a family receiving a lower benefit -- for example, the Arizona

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[3] Center on Social Welfare Policy and Law, *Jobless, Penniless and Often Homeless: State General Assistance Cuts Leave "Employables" Struggling for Survival* (1994); Michigan League for Human Services, *Final Report: The Impact on Individuals and Communities of the Reductions in Social Services in Michigan 1991-92* (1993) (25% of former recipients homeless within six months of losing benefits); Linda Crowell, *et al.*, *A Survey of GA Recipients Before and After Program in Cuyahoga County* 43-44 (1992) (in Ohio homelessness jumped 17% within six months of reductions).

[4] U.S. Dep't of Labor, *Employment and Training for America's Homeless* (1998).

[5] Fair Market Rents for the Section 8 Housing Assistance Payments Program -- Fiscal Year 1998, 62 Fed. Reg. 50,724, 50,731(1997) (to be codified at 24 C.F.R. pt. 888).

[6] Committee on Ways and Means, U.S. House of Representatives, *Green Book* 524-25 (1998) (Table 7-47).

TANF benefit, set at $418 -- the housing costs are prohibitive. For a family receiving the Mississippi TANF benefit of $144, finding housing in California will be virtually impossible.

Families who become homeless as a result will face severe and permanent harm. Numerous studies demonstrate that compared to their housed peers, homeless children experience higher rates of developmental delays, perform less well in school -- including lower test scores, higher rates of absenteeism, and higher likelihood of being held back -- and suffer disproportionately from psychological problems.[7] Further, homelessness and the barriers imposed by the resulting lack of an address, telephone, transportation, shower and appropriate clothes make it difficult to secure and sustain employment.[8] Families that fail to secure employment face the prospect of sanctions under TANF for failing to comply with the work requirements, and thus face spiraling hardships.

Benefits set at levels that are sufficient for families to afford housing in the community in which they live are critically important to prevent homelessness for those families and to further their self-sufficiency as intended by welfare reform. California's multi-tiered set of benefit levels for its new residents undermines the stated purpose of welfare reform and imposes severe hardship on families from lower benefit states.

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[7] Ellen L. Bassuk, *Homeless Families*, 265 Sci. Am. 66, 70-71 (1991); Yvonne Rafferty & Marybeth Shinn, *The Impact of Homelessness on Children*, 45 Am. Psychologist 11, 1170-79 (1991).

[8] U.S. Dep't of Labor, *Employment and Training for America's Homeless* (1998).

SUMMARY OF THE ARGUMENT

The existence of a right to travel to and reside in a new state cannot be seriously doubted. This right has been affirmed under several constitutional doctrines throughout the nation's history because it is a fundamental part of our federal union. Indeed, California declines to challenge the existence of a right to interstate migration directly and instead focuses on the ability of its TANF program to survive judicial scrutiny.

Any statute that denies the bona fide citizens of a state basic necessities of life based solely on how recently they have moved to the state penalizes the exercise of the right to interstate migration. By denying Respondents sometimes more than half of TANF payments already calculated at subsistence levels, California allows new immigrants into the state to face hunger and homelessness if they lose their jobs.

A program expressly designed to inhibit interstate migration does not further a legitimate government purpose. Because of the fundamental nature of the right to migrate in a federal union, California must provide a compelling justification for its actions. California, however, effectively concedes that its objectives are not compelling by arguing merely that they survive rationality review as social and economic legislation.

California's stated objective -- protecting the public fisc -- cannot justify this discrimination among its citizens, and its means are not rationally related to its end. Given California's focus on recent immigrants, it is absurd to suppose that California intended to accomplish any goal except to deter migration. Indeed, California invokes its fear of a flood of immigrants causing a race-to-the-bottom in TANF benefits to

justify its parsimony. Not only does this justification reveal California's illicit purpose, but it also indicates the weak link between California's purpose and methods. The "race-to-the-bottom" economic model is simply not accurate because increased TANF payments are theoretically and empirically an insufficient incentive to attract new immigrants.

California's categorical penalty of new residents applying for TANF benefits is substantially over- and under-inclusive of its ends. The program makes no attempt whatsoever to grant exceptions for persons who suffer an accident or to identify and reduce incentives for immigrants who move for a higher cash grant. Moreover, the program does not even attempt to affect the incentives of long-term California residents, residents from states with higher TANF grants, or international immigrants.

California cannot rely upon the justifications offered by Congress in passing PWORA[9] *four years* after it created its system. Congress may not violate the Constitution any more than California may, and Congress' *post-hoc* authorization does not justify California's attempt to exclude recent immigrants.

ARGUMENT

I. CALIFORNIA'S LIMIT ON FIRST-YEAR TANF PAYMENTS SIGNIFICANTLY BURDENS THE RIGHT TO INTERSTATE MIGRATION.

California's discriminatory treatment of its citizens with less than one year of residency, Cal. Welf. & Inst. Code

[9] Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PWORA"), Pub. L. No. 104-193, Title 1, § 103(a)(1), 110 Stat. 2112.

§ 11450.03 (West 1997), substantially burdens the right to travel and migration of such citizens. That the denial of sometimes more than half of subsistence benefits is a substantial burden cannot be seriously questioned. Likewise, given its multiple historical and structural manifestations, the existence of a right to migration and travel should not be at serious issue.

A. The Constitution's Tradition And Structure Require The Right To Interstate Migration.

This Court long has recognized and protected the right to interstate migration under various rubrics, most prominently equal protection. Although California concedes the validity of the right itself, its *amici* assert that this Court's articulation of a right to interstate migration was an "isolated anomaly." States Br. at 2. Such a position conflicts with both constitutional history and structure. This Court has consistently prohibited state actions that penalize the rights to interstate migration and travel because such rights inhere in the constitution's structure and, indeed, the very idea of a federal union. See, *e.g.*, *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35, 43-44 (1867).

The right to interstate travel and migration is one "deeply rooted in this Nation's history and tradition." *Moore* v. *City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977) (note omitted). Blackstone recognized that "personal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct." 1 William Blackstone, *Commentaries* *130. Similarly, the Pennsylvania Constitution of 1776 and the Rhode Island

Charter of 1796 recognize the right to travel.[10] See also 1 James Kent, *Commentaries on American Law* * 32 (recognizing a duty to grant passage). In all states, from their founding onward, citizens have possessed "the fundamental right, inherent in the citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom." *United States* v. *Wheeler*, 254 U.S. 281, 293 (1920); see also *United States* v. *Guest*, 383 U.S. 745, 757-58 (1966) (considering a right to travel a "firmly established and repeatedly recognized . . . basic right under the Constitution").

This tradition of freedom of movement has found its most forceful expression in cases under the banner of equal protection. In three cases, *Shapiro* v. *Thompson*, 394 U.S. 618, 638 (1969), *Dunn* v. *Blumstein*, 405 U.S. 330, 338-39 (1972), and *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 261-62 (1986), this Court has struck down durational residency requirements that affected basic necessities of life -- subsistence, voting, and non-emergency medical care. Each of these cases held unconstitutional state action which created two classes of residents distinguishable only by length of residence and then used this criterion to deny a basic necessity to the newcomers. In each of these cases, this Court applied strict scrutiny and held that the government's categorization of its citizens based on residency did not further a legitimate purpose. As the Court

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[10] Pennsylvania Constitution of 1776, ch. 1, para. XV ("That all men have a natural inherent right to emigrate from one state to another that will receive them, or to form a new state . . . whenever they think that thereby they may promote their own happiness."); Rhode Island Charter of 1796 ("[I]t shall be lawful to and for the inhabitants of the said Colony of Providence Plantations, without let or molestation, to pass and repass, with freedom, into and through the rest of the English Colonies, upon their lawful and civil occasions . . . .").

held in *Memorial Hospital*: "[T]he right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents." 415 U.S. at 261.[11]

This Court's substantive due process jurisprudence has also recognized a right to travel as an aspect of personal liberty "'so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" *Michael H.* v. *Gerald D.*, 491 U.S. 110, 122 (1989) (internal citation omitted). As early as *Williams* v. *Fears*, 179 U.S. 270, 274 (1900), this Court recognized the right to interstate travel under this rubric. *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972), similarly recognized a right not to be barred from, among other things, "wandering or strolling [ ] from place to place." *Id.* at 156-57 n.1 (quotation omitted); see also *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983); *Guest*, 383 U.S. at 758.[12]

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[11] In addition to penalizing travel, California's provision also violates equal protection in the sense of allowing reverse discrimination based on national origin. Under the California system, a person migrating from another state receives benefits at his former state's level, if the former state's benefits are lower. A person migrating from any foreign country such as Mexico, however, receives full California benefits from their first day. Section 11450.03 may make a person better off by not being an American.

[12] Such an approach is fully consistent with the demands of *Graham* v. *Connor*, 490 U.S. 386 (1989), and progeny that prefers reference to an explicit source of constitutional protection over generalized invocations of substantive due process. Given the structural nature of the right to travel and migration and its lack of an express textual referent, the right to travel is suited for substantive due process analysis. *See Aptheker* v. *Secretary of State*, 378 U.S. 500, 505-06 (1964) (locating a right to international travel in the substantive component of the due process clause).

Given the importance of the right to travel to personal liberty, it is not surprising that several Justices have located the right to travel and migration in the Privileges and Immunities Clause of Article IV, § 2. As Justice O'Connor wrote in *Zobel* v. *Williams*, 457 U.S. 55 (1982) and *Attorney General* v. *Soto-Lopez*, 476 U.S. 898 (1986), the fact that a recent immigrant is harmed only after establishing new residency is not of significance because the new resident is harmed as if she were a non-resident. In taking this plain text reading of Privilege and Immunities, Justice O'Connor not only emphasizes the structural and symbolic importance of the right to travel but also reflects the historical importance of the clause. *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868) (involving Privileges and Immunities clause of Article IV, § 2).[13] By recognizing that the Clause was not intended to be devoid of meaning, this approach underscores the importance of the right to interstate migration as a fundamental and personal right that is part of the set of rights of *national* citizenship.[14]

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[13] The framers of the Fourteenth Amendment's Privileges or Immunities Clause, who were attempting to reflect the content of Article IV, certainly thought the clause had significant meaning. *See* Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution* 53 (1991); John Hart Ely, *Democracy and Distrust* 22-30 (1980); *see also* Cong. Globe, 39th Cong., 1st Sess., 2542 (1865) (declaring that the amendment protected the privileges and immunities of all of the citizens and the "inborn rights of every person"); Cong. Globe, 42d Cong., 1st Sess., 84 (1871) (explaining privileges or immunities by reference to the first eight amendments to the Constitution); Cong. Globe, 39th Cong., 1st Sess., 1265-66 (1865) (explaining that the Clause included the rights listed in Justice Washington's *Corfield* opinion as well as the Bill of Rights).

[14] By identifying the right as a national right enforceable against the State, Justice O'Connor's approach would resolve many of the difficulties associated with the incorporation doctrine. Cf. *Duncan* v. *Louisiana*, 391 U.S. 145, 166 (continued...)

The right to travel and to interstate migration is so deeply embedded that several cases have found the right to be located in other provisions or as inherent in the federal union. See, *e.g.*, *Edwards* v. *California*, 314 U.S. 160, 173-74 (1941) (relying upon the Commerce Clause); *Corfield* v. *Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, J., on circuit) (listing the "right of a citizen of one state to pass through, or to reside in any other state . . . " as one of those "privileges and immunities which are, in their nature, fundamental.")[15] As the Court in *Crandall* opined, the right to interstate travel is inherent in general principles of federalism. 73 U.S. (6 Wall.) at 43-44. Based in part on the economic importance of unfettered mobility for factors of production, whether materials or labor, this Court has consistently rejected restrictions on the right to travel in, ironically, Communist Party affiliation cases, *Kent* v. *Dulles*, 357 U.S. 116, 117-19, 130 (1958); *Aptheker*, 378 U.S. at 514.[16] Whatsoever is true of the right to interstate migration, it must be admitted that it did not

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[14] (...continued)
(1968) (Black, J. concurring) (arguing for incorporation through the Privileges or Immunities Clause).

[15] *See also The Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting) ("We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption").

[16] Even Russia itself is now re-thinking its system of *propiska*, which are passport stamps allowing residency only in a particular city used to restrict the labor market and to justify arresting homeless persons and dispersing them outside of city borders. *See, e.g.*, Michael Specter, *Drifter Mounts Attack Against Siberia's Homeless System*, Houston Chronicle (Feb. 1, 1998); Sergei Strokan, *Russia: Banning the 'Bomzhi,' Moscow Mayor's War on the Homeless*, InterPress News Service (Sept. 24, 1996).

begin or end with *Shapiro*, and is certainly not the "isolated anomaly" that petitioners' *amici* accuse it of being.

B. California Directly and Intentionally Penalizes the Exercise of the Constitutional Right to Interstate Migration.

Petitioners deny that their TANF program has any impact on a citizen's right to travel, or at most imposes a "remote and incidental" impact. Pet. Br. at 25. The facts are otherwise. On its face, § 11450.03 targets only TANF applicants who have recently migrated to California. It limits the grants which enable recent arrivals to provide themselves with the basic necessities of life to the amount available in their former states (whenever that amount is less than California's benefits). While California's first-year penalty does not expressly bar the migration of workers, it does penalize travel by increasing the risk that a person could move into California, with its higher cost of living, only to find herself trying to live on a TANF benefit not calibrated to California's cost of living. In Respondent Roe's case, California would provide her only *54 percent* of the benefits that an identically-situated citizen who lived in California for a year and a day would receive.[17] So substantial a decrease certainly endangers the recipients' ability to obtain the necessities of life. One year without adequate food or shelter is catastrophic. California's TANF program thus

[17] Petitioners' argument that the success of this litigation would make it unconstitutional for states to have different benefit levels (Pet. Br. at 20 n.5) seriously misstates Respondents' position. California has created two classes of its *own* residents based solely on length of residence and former address, factors not rationally related to benefits. This argument has no application to the ability of each state to set its own level of benefits.

imposes a sufficiently grave burden so as to constitute a penalty for constitutional reasons.

The reduced benefits provided to recently-arrived residents are similar to the denial of non-emergency medical care to new residents that this Court struck down in *Memorial Hospital*. There, the State of Arizona provided emergency medical care to new indigent residents but refused to provide them with the non-emergency medical care it provided to its long-term indigent residents. 415 U.S. at 258. The Court recognized that "governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements." *Id.* at 259. The Court found non-emergency medical treatment to be a 'basic necessity' and determined that depriving new residents of such treatment penalized the right to travel. In so ruling, the Court declared that the right of travel insured new residents the "same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents." *Id.* at 261.

Section 11450.03 provides certain new residents in California with a fraction of the "vital government benefits" for the basic necessities of life that are provided to longer term residents. Under *Memorial Hospital*, this unequal treatment of residents penalizes the new resident's right to travel and is unconstitutional "'unless shown to be necessary to promote a *compelling* governmental interest. . . .'" *Id.* at 262, (quoting *Shapiro*, 394 U.S. at 634). This system is a penalty on the

exercise of the right to interstate migration as surely as tax on goods coming across the state line.[18]

Petitioners attempt to avoid the plain result of the classification scheme by arguing that the proper comparison is not of new and old California residents, but of new California residents before and after their move. Pet. Br. at 22-28. Petitioners assert that because new arrivals to California are not receiving less than they would have received in their former states, they are not "penalized," and thus there is no cause to question California's tiered benefit scheme.

Petitioners' argument misapprehends the applicable precedent of this Court. Petitioners claim that *Zobel*, *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612 (1985), and *Soto-Lopez* compared the disparate treatment accorded newcomers and long-term state residents only as a threshold matter, to see whether an equal protection challenge could lie. Pet. Br. at 23. Petitioners then treat these cases as if they have no further bearing on the constitutionality of classifications among residents that impose no overt "penalty" on the newcomer. The teaching of these cases cannot be cabined so narrowly.

In *Soto-Lopez*, the Court considered a New York law that granted civil service preferences to veterans who resided in New York when they entered the military. Newcomers were not deprived of a benefit they enjoyed in their previous state of residence. Nonetheless, a plurality of the Court held the preference unconstitutional for reasons that are applicable here: "Once veterans establish bona fide residence in a State, they

[18] Indeed, the United States parts ways with Petitioners for asserting that the restriction is not a penalty.

become the State's 'own' and may not be discriminated against solely on the basis of [the date of] their arrival in the State." 476 U.S. at 911 (quoting *Hooper*, 472 U.S. at 623). In turn, *Hooper* involved the constitutionality of a state property tax exemption for veterans who were New Mexico residents prior to specified dates. Although the recently arrived veterans lost no pre-existing tax exemption upon their move to New Mexico, the *Hooper* Court held that the state could not prefer established resident veterans over newcomers in the retroactive apportionment of an economic benefit. *Hooper*, 472 U.S. at 623. Similarly, in *Zobel*, the Court examined an Alaskan program that paid all residents some dividends flowing from its mineral wealth, but paid larger sums to longer term residents. Again, newcomers to Alaska were not "deprived" of anything by moving to Alaska; they were not receiving anything comparable from any other state. The Court nonetheless held that the state's classifications were unconstitutional. 457 U.S. at 63-64.

Subsequent to these cases, the Court has noted that the analysis in the right to travel cases "is informed by the same guiding principle -- the right to migrate protects residents of a State from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from other similarly situated residents." *Soto-Lopez*, 476 U.S. at 904. Thus, under well-established Supreme Court precedent, California is burdening the right to travel by providing its new citizens with smaller subsistence benefits than those available to all other citizens -- even if the new citizens have not been deprived of a preexisting benefit.

II. CALIFORNIA'S RESIDENCY CLASSIFICATION CANNOT SURVIVE JUDICIAL SCRUTINY.

When a state imposes discriminatory classifications among its citizens, it has presumptively denied its citizens equal protection under the law and it will be required to defend the challenged classification. *Soto-Lopez*, 476 U.S. at 904. Where, as here, California law penalizes the right to settle in California by limiting (in some cases drastically) subsistence TANF benefits based on the length of the applicant's residency, strict scrutiny is appropriate. This law, however, fails regardless of the level of scrutiny applied, because California cannot demonstrate that its residency classification scheme bears even a rational relation to a legitimate state goal. Further, the California statute violates the Privileges and Immunities secured under Article IV and must be rejected on that basis as well.

A. Section 11450.03 Fails Strict Scrutiny.

As established above, § 11450.03 effects a substantial burden on Respondents' right to travel and migrate to another state. Thus, strict scrutiny is appropriate. This Court succinctly described the nature of the inquiry in *Soto-Lopez*: "[W]e asked expressly whether the distinction drawn by the State between older and newer residents burdens the right to migrate. Where we found such a burden, we required the State to come forward with a compelling justification." *Id.*; *accord Shapiro*, 394 U.S. at 634; *Dunn*, 405 U.S. 330; *Memorial Hospital*, 415 U.S. 250.[19] Further, California cannot choose means that

[19] This standard of review applies both when a right to travel claim is made distinctly from an equal protection claim or as part of it. "[R]egardless of the (continued...)

unnecessarily burden or restrict the constitutionally protected right to travel and migration: "[I]f there are other, reasonable ways to achieve [legitimate] goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference." *Dunn*, 405 U.S. at 343.

In this case, California asserts no compelling justification for its residency classification, *effectively conceding that it has none*. Instead, California relies exclusively on its argument that §11450.03 is a "statute in the area of economic and social welfare," so that the Court should apply only the 'rational basis' test. Pet. Br. at 13, 24 (citing *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970)).[20] Where California targets poor newcomers, it is engaged in invidious discrimination and should be put to its proof of a compelling justification. Petitioners' stated justifications for this law are not compelling. Furthermore, the purpose that appears to underlie the law -- inhibiting the migration of poor people into California -- is neither legitimate nor supportive of California's pretense of an economic theory.

Petitioners' brief identifies the general purpose behind its program as "reducing state expenditures and aiding in welfare

[19] (...continued)
label we place on our analysis -- right to migrate or equal protection -- once we find a burden on the right to migrate the standard of review is the same. Laws which burden that right must be necessary to further a compelling state interest." *Soto-Lopez*, 476 U.S. at 904 n.4.

[20] It is facile of Petitioners to argue that classifications among citizens are of no consequence if embedded in a "social or economic" scheme. *Dandridge* itself cautioned that a State may not "impose a regime of invidious discrimination in violation of the Equal Protection Clause of the 14th Amendment." 397 U.S. at 483.

reform." Pet. Br. at 26. Reducing state expenditures in no way justifies making an irrational classification among a State's citizens. As *Memorial Hospital* teaches, a "State may not protect the public fisc by drawing an invidious distinction between classes of its citizens" because "[t]he conservation of the taxpayers' purse is simply not a sufficient state interest to sustain a durational residence requirement which, in effect, severely penalizes exercise of the right to freely migrate and settle in another State." 415 U.S. at 263 (internal citations omitted); see also *Shapiro*, 394 U.S. at 633. Petitioners' passing reference to the purpose of "aiding welfare reform" is meaningless standing by itself and thus provides no support for the Petitioners' classification scheme.

Petitioners deny that there is any evidence that the primary objective of § 11450.03 is to impede travel. Pet. Br. at 17 and n.4. However, it is difficult to imagine that the prospect of impeding migration by poor people was *not* the statute's objective. Newcomers requesting TANF are the sole targets of § 11450.03. Indeed, Petitioners make lengthy reference to *Congress'* rationale for enacting the PWORA, namely to avoid creating "country-wide welfare magnets in high-benefit states." Pet. Br. at 8. Petitioners are understandably reluctant to admit that §11450.03 was designed to inhibit the migration of poor people into California, because such a purpose is recognized to be unconstitutional. See, *e.g.*, *Hooper*, 472 U.S. at 620 n.9 ("A state objective to inhibit migration into the State would encounter 'insurmountable constitutional difficulties.'") (citations omitted); *Zobel*, 457 U.S. at 62 n.9; *Memorial Hospital*, 415 U.S. at 263-64; *Shapiro*, 394 U.S. at 629.

B. Section 11450.03 Fails Intermediate Scrutiny.

The *amicus* brief of the United States provides further evidence that the classifications in §11450.03 are not benign and warrant more than rational basis review. The United States observes that California's effort to treat some of its citizens differently based solely on how recently they became residents is "constitutionally problematic." U.S. Br. at 18. As a result, the United States rejects Petitioners' assertion that rational basis is the appropriate standard of review.[21] It urges an intermediate level of scrutiny in which California must show that its residency classification scheme is (1) "substantially related" (2) "to an important governmental objective." *Id.* at 10.[22]

The United States' recitation of the presumed congressional goals does not constitute the "important governmental objectives," required under the intermediate scrutiny proffered by United States itself. Even if one were to attribute the presumed congressional goals to a State's statute, the goals given -- of achieving interstate integration and coordination, preventing the distortion of incentives, and promoting the effectiveness of the federal program, U.S. Br. at

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[21] The United States concedes that California alone could not demonstrate an important governmental objective necessary to justify this classification. U.S. Br. at 20. It argues, however, that Congress' purposes supporting the authorization in PWORA for certain durational residency requirements could be attributed to state legislation that "fairly implements" it. *Id.* at 9.

[22] *Amicus* believes that strict scrutiny is the appropriate standard of review for laws substantially burdening the right to travel. However, the intermediate scrutiny standard, when carefully applied, will uncover egregious burdens on the right to travel, such as this law.

26, -- are makeweight, not legitimate or not well-founded. The goals of "interstate integration and coordination" and the "effectiveness of the federal program" do not even pertain to California's residency classification scheme apart from the remaining goal -- the often-mentioned desire to "prevent[] the distortion of incentives."

California's concern over "distorting incentives" is meritless. More fully stated, California's concern is that states will "race-to-the-bottom" in their TANF levels because one state's supposedly high level of payments will, all other things being equal, at the margin, attract more people than if it had lower payments.[23] Not only does this theory neglect the overwhelming incentives against such a race but it also omits the contrary empirical research and, in the end, would establish a perverse precedent useful to restrict any public good.

According to its own theory, California must restrict the supply of new entrants into the TANF program to avoid a plague of TANF-recipient locusts that will devour the available resources. TANF recipients, however, are also part of the pool of labor. Thus, it is equally valid to describe California's program as a systemic barrier to the entry of new workers who will bid down wages available to resident workers. California thus restricts the number of workers, so as to increase the costs of labor, *i.e.* wages, and to decrease economic efficiency. Cf.

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[23] California relies on a small marginal tail of recent immigrants to wag the much larger dog of longer-term residents who receive TANF. The number of people who will move based on benefit levels cannot conceivably be significant in comparison to those who do not move. Indeed, the idea that large numbers of persons eking a living out of intermittent minimum-wage jobs could move mocks the realities of the working poor.

Papachristou, 405 U.S. at 161 (discussing similar aims of Statute of Laborers). California in effect suggests that it must be allowed to violate the right to travel, in order to save welfare for its "true" residents. Any coordination of legal systems, *i.e.* federal provisions or state compacts that eliminate such effects *while respecting personal rights*, can resolve such a dilemma.[24]

All things being equal and assuming that California's real level of payments are higher than surrounding states, some marginal "magnet" effect would be present. All other things, however, are not equal. Persons often will not know that a state provides higher benefits.[25] Moreover, to the extent that labor mobility depends upon factors extrinsic to the narrow monetary calculus that is supposed to drive TANF recipients, benefits levels in one state will not affect the benefit levels in another. People certainly move for a better job or even prospects for one, but people also move (or not) for reasons unrelated to money, *e.g.* the presence of familial resources,[26]

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[24] While this Court does not decide policy debates, it does monitor the framework of such debates to protect individuals, especially when those individuals, such as newcomers, lack a political voice. See *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

[25] Most TANF recipients possess insufficient information to understand the true incentives. Without some tie to an area, such information is very difficult to get. *See, e.g.*, Barry Wellman, *The Place of Kinfolk in Personal Community Networks, in Families in the U.S.: Kinship and Domestic Politics* 231, 234 (Karen V. Hansen & Anita Ilta Garey eds., 1998). Any "race" to the bottom would feature many people running the wrong way.

[26] *See, e.g.*, Jacqueline Jones, *The Dispossessed: America's Underclasses from the Civil War to the Present* 215 (1992) ("changes in household composition often proved to be the precipitating factor" in migration (continued...)

sentimental reasons, or lifestyle reasons such as avoiding prejudice. Moving itself is very expensive and fraught with uncertainty, and the working poor lack access to national labor market information. Accordingly, in contrast to "race-to-the-bottom" participants that California hypothesizes, actual TANF recipients may not know the incentives, and, if they did, would discount benefits by the local cost of living and include moving costs and an uncertainty premium in evaluating their choices.

Accordingly, it is no surprise that, empirically, California is no magnet. Although the nominal level of benefits is high, the cost-of-living adjusted benefit level is significantly lower than many states. That fact may explain why, with 12 percent of the national population in 1996-97, California had only 10 percent of the AFDC caseload. See Pet. Br. at 4. Indeed, California appears to be *losing* population to other states.[27] Empirical

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[26] (...continued)
decisions); *Id.* at 242-43 (migrants usually moved to cities where relatives were living); William Michelson, *Residential Mobility and Urban Policy, in Residential Mobility and Public Policy* 79, 81 (Urban Affairs Annual Reviews Volume 19, W.A.V. Clark & Eric G. Moore eds., 1980) (poor immigrants often move with help of family who preceded them); James N. Dertouzous & Robert F. Schoeni, *Preparing for Welfare Block Grants: Issues Facing California, in The New Fiscal Federalism and the Social Safety Net: A View From California* 19, 39 (James Hosek & Robert Levine eds., 1996) (family ties deter poor people from migrating to other states).

[27] *See* Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1997*, at 30 (117th ed. 1997) (California's net domestic migration from July 1, 1995 to July 1, 1996 was a loss of approximately 258,900 people.); Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1994*, at 29 (114th ed. 1994) (California's net residential change from April 1, 1990 to July 1, 1993 was a loss of (continued...)

research also does *not* support the supposition that welfare recipients migrate to maximize their benefits. Instead, interstate differentials in welfare benefit levels are found to have no effect on interstate migration.[28] The differences in benefit levels from one state to another are found to be not large enough to offset the costs of moving, which can include the costs of separation from family members who provide important resources.

In the end, California's "race-to-the-bottom" theory is a pretense that proves too much because *all* public goods provide an incentive for entry into a state. Good job training programs, schools, public medical care, parks, and so forth, all, at the margin, entice immigrants. The logical extension of California's program would restrict the ability of recent immigrants to enjoy such benefits so as to ensure their quality and availability for longer-term residents. Perhaps one could go to school after being in California for a year, use the library after two years, and graduate to emergency medical care access in the third year of residency. Such restrictions would be absurd. See, *e.g.*, *Memorial Hospital*, 415 U.S. at 261. This Court would not allow residency restrictions for matters of legislative grace

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[27] (...continued)
approximately 739,000 people.).

[28] *See* James N. Dertouzos & Robert F. Schoeni, *Preparing for Welfare Block Grants: Issues Facing California*, in *The New Fiscal Federalism and the Social Safety Net: A View From California* 19, 37, 39 (James Hosek & Robert Levine eds., 1996) (citing James R. Walker, *Migration Among Low-Income Households* (Institute for Research on Poverty Discussion Paper 1031-94, 1994). Interstate migration motivated by different levels of welfare benefits is most likely for cities, such as Washington, D.C., that straddle state lines so that the cost of migrating is lower. California, however, has no major cities along its interstate borders.

outside the TANF arena, and it should not allow such restrictions on TANF benefits.

C. Section 11450.03 Is Not Rationally Related To Its Stated Goals.

Section 11450.03 is not rationally related to the goals ascribed to it by Petitioners and the United States.[29] As an initial matter, § 11450.03 was first enacted in 1992, four years *before* passage of the federal welfare reform statute, PWORA. Thus Petitioners cannot rely on the United States' argument that state legislation "designed and sufficiently tailored" to "fairly implement" the PWORA could rely on Congress' national goals. On a substantive basis, California's residency classification scheme is overbroad in relation to the repeatedly-invoked concern that high cash benefits in any given state will create incentives for indigent persons to move. Instead, §11450.03 targets *all* applicants for TANF benefits who have been resident for less than a year. It creates no exceptions, for example, for a person who moved for reasons demonstrably unrelated to TANF benefits, or who was gainfully employed upon arrival but who lost his job before a year had passed, or who became unemployed due to an accident or illness. The statute makes no attempt whatsoever to identify those incoming migrants who may be moving simply for a higher cash grant, such as persons

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[29] By definition, therefore, it is not 'substantially related' to those goals under the intermediate scrutiny standard advocated by the United States. The United States articulated the showing a State must make in a PWORA implementation case as follows: "[W]hen an individual alleges that the State has unduly burdened the right to migrate, it is also appropriate for a court to assure itself that the State's action is designed -- and sufficiently tailored -- to serve the purposes of the federal authorization. U.S. Br. at 26.

who are employable but were nonetheless on welfare in their prior state, so as to deal with them particularly.

Conversely, § 11450.03 is underinclusive in other significant respects. In an effort to reform welfare by providing incentives to work, § 11450.03 provides the "incentive" of subsistence payments reduced below the California level to only a small subclass of persons who are receiving benefits but are employable and could be motivated to find work. Only newcomers from states with low welfare benefits suffer the incentive of reduced subsistence payments. Existing California residents are not prodded, nor are newcomers from states that paid higher benefits.[30] Even legal migrants from foreign countries do not suffer a reduction in California's subsistence payments. It is irrational to assume that among the TANF applicant pool, the subclass of newly arrived California residents haling from states with low welfare payments are somehow better able to bear a reduction in subsistence payments, or are more able to respond to this incentive. Furthermore, the savings to California's TANF program (effected by the reduction in benefits) is not the product of rational decision-making. It is simply fortuitous, the difference between the TANF cash benefit levels in California and in the applicant's prior state, should that be a lower-benefit state. Accordingly, § 11450.03 is not rationally related to the Petitioners' legitimate

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[30] In addition to the many infirmities associated with its application, §11450.03 fails to address the problem laid out in the United States' brief. Footnote 5 describes a hypothetical 'distorted incentive' of a type that Congress presumably intended to avoid by authorizing a durational residency requirement. In the hypothetical, however, the strictures of §11450.03 do not benefit the state. The cash benefit in the new state (state B) is lower than in the original state (state A), so the newcomer would still be eligible for the full cash benefit in the new state.

objectives and fails the rational basis test. See *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 447-450 (1984) (rejecting a special use permit requirement for mentally retarded persons because that status was not relevant to the permit's purposes). A State may not make invidious discriminations among its citizens, even in the context of social and economic legislation. *Dandridge*, 397 U.S. at 483.

D. California's Program Fails Privileges and Immunities Scrutiny.

Another cogent way to analyze whether § 11450.03 imposes an impermissible burden on Respondents' right to travel is to consider the effect that the statute has on Respondents' privileges or immunities as United States citizens. The Privileges and Immunities Clause provides that States must treat residents and nonresidents without "unnecessary distinctions" when a nonresident seeks to "engage in an essential activity or exercise a basic right." *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U.S. 371, 387 (1978) (quoted in *Zobel*, 457 U.S. at 76 (O'Connor, J., concurring)).

The plain language of §11450.03 draws a clear distinction between old and new state residents to the detriment of the new residents for no other reason than they are new residents. Respondents are treated less well than comparably situated long term residents because they have exercised one of the most basic rights of United States citizenship -- the right to interstate travel and migration. See, *e.g.*, *Crandall*, 73 U.S. (6 Wall.) at 43-44; *Guest*, 383 U.S. at 757-58; *Moore*, 431 U.S. at 503. Justice O'Connor's characterization of the dividend plan invalidated in *Zobel* is equally apt here: "Stripped to its essentials, the plan denies [non-Californians] settling in the State

the same privileges afforded longer term residents." 457 U.S. at 73 (O'Connor, J., concurring). In these circumstances, the Privileges and Immunities Clause provides an appropriate analytical framework. The durational residency provision in §11450.03 is in force for an entire year. Throughout this time California treats new residents as if they were residents of their former states for the purpose of calculating TANF benefits. Indeed, California pegs the reduced benefit to precisely the grant available from the new resident's former state whenever the other state pays less than California.

California's durational residency distinction cannot stand unless a State can establish both (1) that those treated as non-residents "constitute a particular source of the evil at which the statute is aimed;" and (2) there is a "'substantial relationship' between the evil and the discrimination practiced against those treated as non-residents." *Id.* at 76 (O'Connor, J., concurring), see also *Hicklin* v. *Orbeck*, 437 U.S. 517, 526-27 (1978). California cannot meet this burden. As discussed above, Petitioners claim to be avoiding the primary "evil" of the drain on funds caused by residents applying for TANF assistance rather than finding work. Inasmuch as § 11450.03 targets only new residents, Petitioners must show that new residents are the "peculiar source" of the drain on funds for welfare. Petitioners have not argued, much less established, that new residents to California apply for TANF assistance in large absolute numbers or in markedly greater proportion than long-term residents, or that new residents are peculiarly unwilling to find work once they have settled in California.

Petitioners also cannot satisfy the second part of the privileges and immunities standard, *i.e.*, that the reduction in subsistence funds to new residents is "substantially related" to

the goal of preserving TANF funds or creating work incentives. Rather, California's actual savings by reducing subsistence benefits is wholly arbitrary. Though all new residents have reduced TANF payments for the first year, California only saves money on new migrants arriving from low cash grant states. Furthermore, the amount of the savings depends on the benefit scheme in whichever of the forty-four lower paying states the immigrant arrives. Such a scatter-shot plan does not substantially or meaningfully relate to fiscal responsibility. Indeed, to the extent the statutorily mandated reduction in TANF funds acts as an "incentive" for incoming migrants to find work, it is unjustified and arbitrary. Actual reductions in TANF benefits are levied only on a small subset of recipients, and there can be no showing that new residents from states that happen to have low cash welfare benefits are more in need of this draconian incentive than are migrants from other states or other countries. Indeed, the statute creates no comparable work incentive for long-term California residents, who certainly comprise the largest number of applications for TANF benefits.[31] Because California applies no work incentive to most TANF applicants, whether new or old residents, § 11450.03 cannot be substantially related to a governmental objective to create such incentives.

Petitioners have argued that Respondents' rights are not violated because they are not "worse off" with regard to TANF benefits than they were in their former state. Under a privileges and immunities analysis, as with an equal protection analysis, Respondents' right to interstate migration is burdened because they are singled out and treated less well than similarly-situated

[31] Respondents acknowledge that California's welfare statute contains certain work incentives for all residents who receive TANF funds.

citizens. For example, in *Austin* v. *New Hampshire*, 420 U.S. 656 (1975), this Court sustained a privileges and immunities challenge to a tax New Hampshire levied only on in-state income earned by non-residents. New Hampshire defended the statute by arguing that the non-residents' tax burden was not increased because their home states credited the New Hampshire tax paid against their home state tax bill. The Court rejected the argument, ruling that the statute was a "unilateral imposition of a disadvantage upon nonresidents." *Id.* at 667 n.12. As Justice O'Connor's indicated in *Zobel*, the existence of a burden on a fundamental right is to be found by comparing residents and non-residents, or those treated as non-residents. "The 'burden' imposed on nonresidents is relative to the benefits enjoyed by residents. It is immaterial, for purposes of the Privileges and Immunities Clause, that the nonresident may enjoy a benefit in the new State that he lacked completely in his former State." 457 U.S. at 76 n.6 (O'Connor, J., concurring).

III. CONGRESS CANNOT AUTHORIZE CONSTITUTIONAL VIOLATIONS BY RE-DEFINING THEM AS A "CHOICE OF LAW."

Congressional authorization for a State to violate a constitutional right does not change the manner in which a court should scrutinize the governmental action at issue. Despite the United States' attempt to re-categorize PWORA as a "choice of law" provision, mere passage of a bill by Congress does not support Petitioners' statute. Article III courts or the Article V amendment processes are the proper fora for such consideration. See, *e.g.*, *City of Boerne* v. *Flores*, 117 S. Ct. 2157 (1997); *Plaut* v. *Spendthrift Farm, Inc.*, 1514 U.S. 211 (1995). As this Court has opined: "Congress may not authorize States to violate the Equal Protection Clause . . . [and] is

without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause." *Shapiro*, 394 U.S. at 641. The fact that a national, as opposed to state, majority has authorized a penalty on new immigrants does not affect the level of scrutiny to be applied. Discrimination merits no less strict scrutiny when practiced by the federal government. Compare *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995) with *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989). Likewise, Congress cannot violate the rights of national citizenship or authorize the violation of such rights by a State.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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No. 98-97

IN THE

Supreme Court of the United States

October Term, 1998

ELOISE ANDERSON, Director, California Department of Social Services; CALIFORNIA DEPARTMENT OF SOCIAL SERVICES; PETE WILSON, Governor of the State of California; and CRAIG L. BROWN, Director, California Department of Finance,

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v.

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Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

BRIEF OF ACORN, ET AL., AMICI CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF ACORN, ET AL., AMICI CURIAE IN SUPPORT OF RESPONDENTS

IDENTITY AND INTEREST OF THE AMICI CURIAE

Pursuant to Supreme Court Rule 37, the organizations listed below respectfully submit this brief amicus curiae in

support of Respondents Brenda Roe and Anna Doe, et al.[1] Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

Amici are:

Association of Community Organizations for Reform Now ("ACORN") (a national organization with local chapters)

EMPOWER of Monroe County (Rochester, NY)

Hospitality House, Inc. (Hinckley, ME)

Independent Heights Welfare Rights Union (Houston, TX)

Kensington Welfare Rights Union (Philadelphia, PA)

Los Angeles Coalition to Erase Hunger and Homelessness

Make the Road by Walking (Brooklyn, NY)

Multi-County Clients Council (Louisville, KY)

9 to 5's Poverty Network Initiative (Waukesha, WI)

Northeast Missouri Client Council for Human Needs, Inc. (Hannibal, MO)

Oakland County Welfare Rights Organization (Pontiac, MI)

Ohio Welfare Rights Organization (Columbus, OH)

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[1] Pursuant to Supreme Court Rule 37.6, the amicus curiae organizations listed in the text above affirm that no counsel for any party in this case authored this brief in whole or in part, and that no person or entity other than amici curiae, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

Poor & Working Class Moms (Mankato, MN)

Reform Organizations of Welfare ("ROWEL") (St. Louis, MO)

Roberts Village Resident Management Corporation (Norfolk, VA)

Sisters in Portland Impacting Real Issues Together (Portland, OR)

State Organization of Client Councils (Columbus, OH)

Washington Welfare Reform Coalition (Seattle, WA)

Welfare Rights Organizing Coalition (Seattle, WA)

Welfare Warriors (Milwaukee, WI)

Women for Economic Security (Chicago, IL)

Workfairness (New York, NY)

These organizations are membership organizations of low income individuals or organizations that include a coalition of membership organizations and low income individuals.

They and the members of their organizations are concerned that the arguments presented to this Court by Petitioner and amici supporting Petitioner do not reflect the challenges which low income Americans face daily and the reality of the world in which they live. Rather, Petitioner and their amici attribute motivation to individuals and legislatures that are based upon assumptions about human behavior that are untrue or at best simplistic and unrepresentative.

Amici respectfully set forth below facts they believe accurately represent the reality of the lives of poor Americans who have migrated and suffered grievous injury through the application of durational residency requirements. These

persons have endured homelessness. They have been forced to choose between seeing their children suffer extreme want or returning to an abuser or batterer. They have suffered, or been threatened with, harm for no reason other than their attempt to move to seek a better future.

Amici also urge the Court to examine the intent of various legislatures that have considered and adopted similar provisions which is, when stripped of its rhetoric, to deter poor people from moving into the state, and to penalize them if they do.

This examination of the reality of poor people's lives and legislative intent will, amici hope, help persuade the Court that durational residency requirements are inconsistent with the fundamental federal character of this nation, with the rights persons have as citizens of the state in which they reside, and with the right of each individual to migrate to another state in the hope of pursuing a better, or at least safer, life.

STATEMENT OF THE CASE

At issue in this action is a challenge to the constitutionality of California's durational residency requirement contained in Section 11450.03. Section 11450.03, states, in relevant part:

> (a) Notwithstanding the maximum aid payments specified in paragraph (1) of subdivision (a) of Section 11450, families that have resided in this state for less than 12 months shall be paid an amount calculated in accordance with paragraph (1) of subdivision (a) of Section 11450, not to exceed the maximum aid payment that would have been received by that family from the state of prior residence.

Cal. Welf. & Inst. Code § 11450.03 (hereinafter the "California Restriction").

In August 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act of

1996 ("PRWORA"), 42 U.S.C. §§ 601, *et seq.* The PRWORA significantly increased the states' discretion to design their federally supported welfare plans without seeking waivers from the Secretary. The Act superseded the AFDC program with a new program entitled Temporary Assistance to Needy Families ("TANF"). The Act authorized the states to apply a one-year durational residency requirement of the kind embodied in Cal. Welf. & Inst. Code § 11450.03. *See* 42 U.S.C. § 604(c).[2] In October 1996, the State of California submitted its TANF plan to the United States Department of Health and Human Services. The plan included a durational residency limitation consistent with California law and § 604(c). On February 28, 1997, in All-County Letter 97-11, the California Department of Social Services instructed the counties to implement the California Restriction (§ 11450.03) as of April 1, 1997.

Brenda Roe and Anna Doe commenced this action on April 1, 1997, brought as an equal protection claim under 42 U.S.C. § 1983, to prevent California from implementing the California Restriction, each having recently moved to California seeking employment and being eligible for assistance. They argued that the California Restriction threatened them with imminent harm; namely, the denial of vital benefits necessary for their sustenance.

The district court entered a temporary restraining order enjoining implementation of the California Restriction, pending a hearing on plaintiffs' request for a preliminary injunction. Finding that the plaintiffs demonstrated the possibility of irreparable harm and that California would not be

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[2] The PRWORA provides:

> A State operating a program funded under this part may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months. 42 U.S.C. § 604(c) (Supp. 1997).

unduly harmed, the district court on June 4, 1997, granted the preliminary injunction, citing its prior reasoning in *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993) regarding the probability of success on the merits. *Roe v. Anderson*, 966 F. Supp. 977 (E.D. Cal. 1997). On April 23, 1997, on the stipulation of the parties, the district court granted class certification.

In finding that Roe and Doe had demonstrated a probability of success on the merits, the district court determined that the apparent purpose of the California Restriction was to deter migration of poor people to California. The State of California appealed the grant of a preliminary injunction to Brenda Roe, Anna Doe, and a certified class of all others similarly situated. The Ninth Circuit declined to decide the merits of the appeal, but determined that appellees established a likelihood of success on the merits and the possibility of irreparable harm. This Court granted certiorari on September 29, 1998.

SUMMARY OF ARGUMENT

The recent use of durational residency requirements is driven by the states' desire to exclude poor newcomers. This desire to exclude the poor is based on a series of myths and stereotypes which are belied by the factual circumstances of the plaintiffs who have challenged durational residence requirements. In reality, poor people move to seek a better life in areas of greater employment opportunity, to be near family, to seek a haven from violence, and for many other reasons having nothing to do with higher welfare benefits. They and their children are severely deprived by durational residency requirements such as the California Restriction at issue here.

The California Restriction is unconstitutional under both the Privileges and Immunities and Equal Protection Clauses because it treats long-term residents and more recent residents differently for no legitimate reason. As such, the California

Restriction cannot survive constitutional scrutiny under any existing test under which a state must justify a classification it makes among its residents.

Congressional approval and funding of California's welfare scheme neither immunizes the California Restriction from constitutional scrutiny nor alters the appropriate standard of scrutiny.

STATEMENT OF FACTS

I. HISTORICAL PRECEDENTS FOR RENEWED RESTRICTIONS ON THE MOBILITY OF POOR NEWCOMERS.

The California Restriction is the result of a recent resurgence of political efforts to exclude poor newcomers by states and localities, and to limit their mobility, which have their roots in a series of enactments which have restricted the movement of indigents for over 600 years. These restrictions, appearing repeatedly in English statutes of the Fourteenth through the Seventeenth Centuries, culminated in the Act of Settlement and Removal of 1662[3]—the source upon which American colonists drew most heavily in framing their own statutes. These restrictions took a variety of forms. Those most closely related to the statute before the Court limited public responsibility for the relief of poverty to residents of the local community.[4] Those provisions were descendants of earlier laws, antedating public assistance, which limited the solicitation of alms to the indigent's parish.[5] The effort to limit the mobility of the poor was further reflected in the removal provisions of the Act of 1662, which empowered public authorities forcibly to return an indigent to his place of settlement whether or not he had sought aid. Finally, the

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[3] 13 & 14 Charles II c. 12 (1662).

[4] 14 Elizabeth c. 5 (1572); 39 Elizabeth c. 3 (1598).

[5] 19 Henry VII c. 12 (1503); 22 Henry VII c. 12 (1530-31).

English Law also provided severe criminal penalties for begging and leaving employment and even for leaving one's place of settlement without permission.[6]

The earliest of these restrictive laws, the Statutes of Laborers of Edward III, and many of their successors, were, in the view of concerned scholars, designed to assure feudal lords an adequate supply of agricultural labor.[7] Moreover, "No servant or laborer . . . shall depart at the end of his term . . . to serve or dwell elsewhere . . . unless he bring a letter [under the King's seal]." 12 Richard III c. 3 (1388). In later years, this design was displaced by other concerns, which, as will be shown, have reemerged in the context of contemporary welfare discourse. The poor were feared as a source of criminal disorder. As Parliament found, "In all places throughout this realm, vagabonds and beggars have of long time increased [producing] continual thefts, murders, and other heinous offences of great enormities . . . ."[8] Their travel was thought to encourage the spread of disease and pestilence. Anticipating problems of modern occurrence, the restrictions also betrayed a fear of urban congestion and attendant disorder.[9]

American history demonstrates that certain colonists brought with them many of the attitudes underlying these restrictions on mobility. Many of the restrictive measures touched on above were imported into the early law of the colonies and their successor states. Indeed, a primary rationale

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[6] *See, e.g.*, 23 Edward III c. 1 (1349), 5 Elizabeth c. 4 (1562) and 14 Elizabeth c. 5 (1572).

[7] In service of this objective, no worker was permitted to go "out of the town where he dwelleth in the winter, to serve in the summer . . ." 25 Edward III c. 7 (1351) Second Statute of Laborers. *See also* 23 Edward III c. 7 (1349) First Statute of Laborers.

[8] 22 Henry VIII c. 12 (1530-31).

[9] Dorothy Marshall, *The English Poor in the Eighteenth Century* (London, George Rutledge, 1926), Chaps. V and VI.

for exclusion of the poor, their purported "moral pestilence", continues to color debate and policymaking on welfare.

That view finds modern expression in a panoply of myths and racial and gender stereotypes which now animates the welfare debate. Whether or not they are recipients of public assistance, the poor are subject to unrelenting attacks on their morality. A prime example is embodied in the welfare magnet "theory". We respectfully submit that this "theory" defames the underprivileged by attributing to them the intent to travel the states, leaving jobs, family and friends, to exploit the public assistance of state governments, without any evidence that differential welfare benefits are or will be a significant impetus to interstate migration. As demonstrated by the circumstances of the plaintiffs who have challenged these restrictions, the welfare magnet "theory" is one more myth, now invoked to justify the imposition of cruel deprivations on poor newcomers who move for a variety of reasons other than the receipt of public assistance.

II. THE RECENT REIMPOSITION OF DURATIONAL RESIDENCY REQUIREMENTS HAS BEEN DRIVEN BY THE STATES' DESIRE TO EXCLUDE POOR NEWCOMERS.

Race- and gender-based American stereotypes of the poor attribute to indigent Americans the following traits: (1) laziness, (2) lack of morals, (3) irresponsible sexual conduct, (4) criminal predisposition, (5) substance abuse, (6) bad parenting and (7) dependency on the public dole.[10]

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[10] Labels that encapsulate these stereotypes range from "pauper", "hard-core poor", "welfare dependent", "slum-dweller", "vagrant", "ne'er-do-well", "white trash", "street urchin", "beggar", "panhandler", "the culturally deprived", "hobo", and, the most recent label, "the homeless". *See* Herbert J. Gans, *The War Against the Poor: The Underclass and Antipoverty Policy* 3 (1995); Beverly Horsburge, *Schrodinger's Cat, Eugenics, and the Compulsory Sterilization of Welfare Mothers: Deconstructing an Old/New Rhetoric and Constructing the Reproductive Right to Natality for Low-*

Based on these stereotypes, many legislatures draw the conclusion that the poor are undeserving of our support and worthy only of exclusion.[11]

While state legislatures are no doubt entitled to enact laws based on legitimate legislative findings, the myths driving welfare policy threaten to further ostracize indigent Americans, who plainly constitute a discrete and insular minority vulnerable to political oppression. The "moral pestilence" of earlier days has been replaced by the image of the "Welfare Mother" or "Welfare Queen"—the mainstream belief being that the typical woman on welfare has numerous illegitimate children, primarily to receive even greater welfare benefits.

These false stereotypes go far to explain the admission of many states that their durational residency requirements are, in fact, intended to deter migration of the poor. Indeed, the state of California admitted at oral argument in the Court of Appeals, "in response to the suggestion that the purpose of § 11450.03 is to keep poor people out of the state [that] 'it does not want people to move to California with a mindset of economic dependency'". *Roe v. Anderson*, 134 F.3d 1400, 1404 (9th Cir. 1998). That statement is a flat admission that the State of California has imposed the California Restriction

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Income Women of Color, 17 Cardozo L. Rev. 531, 535 (1996) ("The stereotype of the lazy Black welfare queen of low intelligence, who breeds children in order to avoid working, dominates the public discussion on the federal budget."); David T. Ellwood, *Poor Support* 5 (1988) (pointing out that Americans do not consider the money received by the elderly and the disabled to be "welfare"); Stephen D. Sugarman, *Financial Support of Children and the End of Welfare as We Know It*, 81 Va. L. Rev. 2523, 2523-24 (1995) (describing the "conservative" view, in which it is "morally reckless" to have additional children without sufficient financial resources).

[11] Linda Gordon, *Pitied But Not Entitled: Single Mothers and the History of Welfare*, 1890-1935, at 2-3, 5-6 (1994) (discussing the development of negative connotations for "welfare" programs, in contrast to the neutral, or even positive connotations attached to social insurance programs).

for the purpose of deterring the settlement of poor persons in the state. Moreover, California's prior representation to this Court that the statute merely "removes California's relatively high AFDC benefit levels, for a period of one year, as one of the factors a person might consider when contemplating a move to California," Pet. Br. at 21 (*Anderson v. Green*, No. 94-197), also admits the state's exclusionary purpose.

The available legislative history demonstrates that the desire to exclude poor newcomers is the driving force behind the recent reenactment of durational residency requirements.

The Wisconsin statute expressly provides that the evaluation of its scheme shall determine "whether the demonstration project deters persons from moving to this state." Wis. Stat. § 49.19(llm)(e). Wisconsin's waiver application introduces its subject matter with a lengthy excerpt from a speech by Governor Pete Wilson of California, condemning the "exploding" growth in welfare spending in that state and attributing it to newly arrived welfare recipients. Wisconsin Department of Health and Social Services, Application for Federal Assistance: "Two-Tier AFDC Benefit Demonstration Project" 2-3 (June 26, 1992). Wisconsin is portrayed as facing a similar crisis. The proposal for a multi-tier scheme in selected parts of the state is based upon the "intuitive conclusion that the differential in benefits is inducing families to move to Wisconsin in search of higher benefits." *Id.* at 5. The first "hypothesis" of the project is that,

> [I]n counties where the two-tiered policy is implemented, there will be a reduction in the percentage of new AFDC recipients who previously resided in a state other than Wisconsin, when compared to the non-demonstration counties for the same time period . . . .

Id. at 26. This "hypothesis" reveals the project's objective: to achieve the projected effect by deterring migration.

The waiver applications submitted by Illinois, Iowa, and Wyoming each describe the purpose in seeking to implement a multi-tier scheme as being to "reduce the incentive" for families to move to the state.

Illinois' waiver application hypothesized that its scheme would result in "a lower percentage of the Illinois AFDC caseload that received AFDC *from other states* in the year prior to moving to Illinois" and a resulting "savings." Illinois Department of Public Aid, Application for Federal Assistance: "Relocation to Illinois Project" 7 (October 1, 1992). The sponsor of the provision in the Illinois legislature agreed that the measure was aimed at preventing the State from "becoming a welfare magnet." *Transcription Debate,* State of Illinois, 87th General Assembly, House of Representatives, 167th Legislative Day at 6 (July 30, 1992). Another legislator questioned the measure's constitutionality, but supported its objective: "while . . . it seems to make sense that we should try to prohibit people from other states coming into Illinois to get larger benefits, it appears very clear that this is unconstitutional." *Id.* at 1.

Iowa's waiver application bluntly declared that: "The [multi-tier] proposal would reduce the incentive for families to move to Iowa for the purpose of receiving Iowa's higher public assistance grants." Iowa Department of Human Services, Application for Federal Assistance: "Iowa Family Investment Program" 75 (April 17, 1993). One state legislator explained, "With all the empty houses in southern Iowa, many out-of-state recipients move to Iowa to get the higher rate." *Mail Call,* Sumner Gazette, October 8, 1992 (Letter from Ray Lageschulte, Iowa State Representative).

Wyoming's waiver application announced that the purpose of the multi-tier benefit scheme was to "reduce the inventive for families to move to Wyoming to receive public assistance." Wyoming Department of Family Services, Application for

Federal Assistance: "Wyoming Relocation Grant" 1 (December 24, 1992). The State continued:

> This project would demonstrate the effectiveness of a proposal *which is intended to discourage clients to move to Wyoming* for a higher public assistance grant.

Id. Throughout its application Wyoming speaks of "reducing the incentive" to migrate, and "discouraging" migration, interchangeably as project goals.

Intent to deter migration is found in other states as well. In Minnesota, the trial court found "a strong inference that the legislature enacted the durational residency requirements to impede the less fortunate from migrating to Minnesota," *Davis v. Doth*, (slip op., p. 12. July 31, 1998). In Rhode Island, the state's witness on the legislative process testified at the preliminary injunction hearing that the Committee was concerned that "there would be perhaps significance in migration which would have very significant costs . . . ." *Westenfelder v. Ferguson*, 998 F. Supp. 146, 156 n.15 (D.R.I. 1998) And in New Jersey, "a spokeswoman for the State . . . said the provision was intended to dissuade people from moving to New Jersey . . . ." *The New York Times*, July 9, 1998, p. B5.

The available legislative history thus proves that the driving motivation in imposing these new durational residency requirements is to deter poor newcomers.

III. THE FACTUAL CIRCUMSTANCES OF THE PLAINTIFFS WHO HAVE CHALLENGED DURATIONAL RESIDENCY REQUIREMENTS DEMONSTRATES THAT POOR PEOPLE MOVE TO IMPROVE THEIR LIVES AND THAT THEY ARE SEVERELY DEPRIVED BY DURATIONAL RESIDENCY REQUIREMENTS.

The factual circumstances of the persons who have challenged the newly resurgent durational residency requirements such as the California Restriction demonstrate that: (1) no plaintiff chose to move solely in order to obtain increased welfare benefits; (2) each plaintiff's right to migrate was in fact penalized; (3) parents and children were severely harmed by the restrictions; and (4) their attempt to improve their condition by moving to other states was significantly impacted by the restrictions.

The circumstances surrounding Respondent Brenda Roe's application for public assistance, as described by the district court below, provides a prime example.

Brenda Roe was a resident of Oklahoma until early 1997. When her husband lost his job, the Roes decided to move to California to pursue employment. Ms. Roe was six months pregnant on April 8, 1997. Ms. Roe states that because of complications that developed in her pregnancy after their move to California, Mr. Roe was unable to leave her unattended and therefore could not work. Ms. Roe was informed by the state social services office that she would be limited to the Oklahoma monthly grant level of $307 when she became eligible for AFDC at the six-month point of her pregnancy, as compared to the California grant level of $565. The monthly rents in the community in which they now reside, Long Beach, California, are $300 for a studio apartment and $450 to $650 for a one-bedroom apartment. Ms. Roe avers that at the time she and her husband decided to move to California she did not

know anything about AFDC or TANF and had never been on welfare.

Numerous other plaintiffs have been forced to seek public assistance because of conditions imposed on them similar to those of Ms. Roe. Ms. Tajuanna Davis, plaintiff in *Davis v. Doth*, No. 620C6-9-010231 (Minn. St. Dist. Ct. Dec. 5, 1997), moved to Minnesota from Illinois in June, 1996, to escape domestic violence, and to pursue self-help in a battered women's shelter. Ms. Davis lived in Minnesota until May, 1997, when she moved to Mississippi because of concerns about crime in her St. Paul neighborhood. After 2½ months in Mississippi, inadequate transportation and limited job opportunities forced her to return to Minnesota to look for secretarial office work in which she was experienced.

When Ms. Davis applied for public assistance, she was deemed ineligible for AFDC until she had resided in Minnesota for 30 days; thereafter, she would receive the benefit amount for a family of three in Mississippi: $120 per month. It being obvious that $120 per month was inadequate to maintain sustenance for Ms. Davis and her three children while in Minnesota, Ramsey County offered to pay to transport her and her family back to Mississippi or Illinois. Because Ms. Davis' abuser resided in Illinois, and no work was available in Mississippi, Ms. Davis chose to stay in Minnesota, but at the price of having to reside for a time in an emergency shelter with her children until moving in with friends. Her plight was the direct result of the state's denial of public assistance in the amount of $412 per month which she would have received but for the fact that she was a new resident.

In *Westenfelder v. Ferguson*, 998 F. Supp. 146 (D.R.I. 1998), Ms. Westenfelder had resided in Rhode Island since 1991, except for one month in 1997 when she moved to Massachusetts to help her mother. She returned to Rhode Island because housing was cheaper and she could still commute to her job. After she lost her job she applied for

public assistance. Because of her recent return to Rhode Island, the state imposed limitations on her public assistance solely because she was a "new" resident. Those limitations resulted in a public assistance payment which was lower than her rent. Another plaintiff in *Westenfelder*, Joanne Davenport, had been a resident of Rhode Island for *40 years*. She was the grandmother and sole caretaker of two minor children nearly since their birth. For three months in 1997, the children resided with their mother in Pennsylvania. When they returned to their grandmother, she was advised that their public assistance benefits would be reduced because of their absence from the state.

The family of plaintiff Douglas Brown in *Brown v. Wing*, 649 N.Y.S.2d 988 (N.Y. Sup. Ct. Oct. 18, 1996), had lived on a farm in New York for three generations. Brown lived and worked in New York except for two years in the military service until 1984, when he, his wife, and their two children moved to Florida to assist his mother and sister in building their homes. He lived and worked in Florida for three years. In 1987 he moved back to New York with his younger son, who has lived in the state since then. In 1992 he moved back to Florida to help his 82 year old mother. For the next three years he engaged in seasonal work in Florida in the winters and New York in the summers. In 1995 he was hospitalized in a veteran's hospital in Florida with severe depression. He moved back to New York in 1996 at his therapist's suggestion. His conditioned worsened, however, and he applied for cash assistance as he was about to become homeless. He was denied aid under the durational residency law then in effect, which has since been permanently enjoined.

In *Jones v. Milwaukee County*, 485 N.W.2d 21 (Wisc. 1992), plaintiffs Vanessa and Kevin Jones lived in Milwaukee County and were denied general relief benefits because they had not resided in Wisconsin for 60 consecutive days. They arrived in Wisconsin with their three children on November 22,

1988, intending to spend the Thanksgiving holidays with a family friend. They arrived late at night and stopped at the bus station so their children could use the rest rooms. When they returned from assisting their children, their suitcases were on the sidewalk and their friend was gone. Prior to coming to Milwaukee, they lived in Chicago, Illinois. They were not employed at the time they arrived in Wisconsin due mainly to circumstances surrounding a fire in their previous home. Being stranded in Milwaukee on November 22, 1988, they decided to remain there and seek work. In an affidavit made part of the record in that case, Vanessa and Kevin Jones state:

> We have decided to stay in Milwaukee because we feel that this is a safer place to live and that it would be a good environment for our children to grow up in. We feel that the schools are better than those in Chicago because there is more structure and discipline. We believe that we could obtain jobs here, find a decent affordable place to live and make a new start. We were not able to do that in Chicago. . . . The only property our family owns is our personal possessions. We have no resources. We do not have any money, income, property or credit or any other means sufficient to obtain food, housing or other necessities.

At the time the Jones family offered that statement, they resided at the Salvation Army Emergency Lodge, a shelter for homeless persons.

Jane Doe, plaintiff in *Doe v. Wing*, No. 98/2903 (N.Y. Sup. Ct. July 30, 1998) had lived in Rochester from infancy in 1955 until 1990, where she worked a variety of jobs. She moved to Florida that year with her husband, seeking job opportunities. Her marriage ended in 1992. She continued working in Florida until she became ill in 1997. She then learned she was infected with the HIV virus. Her sister came to Florida and brought her back to be with family in Rochester.

Her family provided emotional support, but could not provide financial support. New York threatened to pay reduced welfare benefits because of her newcomer status, but the provision has not been implemented.

Green v. Anderson, 811 F. Supp. 517 (E.D. Cal. 1993), involved three plaintiffs. Plaintiff Deshawn Green was a Sacramento resident for twelve years and then moved to Louisiana in 1985. She had two children in Louisiana. in December 1992, Ms. Green decided to move back to California where her mother lives. The full monthly California AFDC grant for a family of three is $624; under the two tier system for the next twelve months Ms. Green was to receive $190 a month, which is what she would have received in Louisiana. Plaintiff Debby Venturella came to California in December 1992. She had one child and was pregnant. She had been living in Oklahoma for six weeks when she decided to move to California where her parents lived. She was not receiving AFDC benefits in Oklahoma. Finally, plaintiff Diana Bertollt moved to California from Colorado to be with relatives. She has one child and will be limited to $280 a month—the Colorado benefit—as opposed to the full California amount of $504 for two family members. *All three plaintiffs explained that they moved to California to escape abusive family circumstances.*

Persons and families denied aid for lack of residence must either live under the most deprived conditions or move on to some other place. Many who remain are forced to rely upon private charity or impoverished relatives. Families become fragmented as a result of the necessity to remove children from their homes while their parents struggle to find employment. Children may also find themselves placed at substantial public expense in foster homes or institutions whose benefits are not

dependent on residency.[12] For some, the prospect of moving "home" may be not only unwise but even life-threatening, placing young children in serious risk of physical harm.[13]

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[12] The state hearing examiner during the administrative hearing prior to the institution of *Mantell v. Dandridge*, Civil Action No. 18792 (D. Md. 1967), stated in connection with the residence requirements that there have been cases of children being placed in foster care and being supported by state money "because we couldn't give them Aid to Dependent Children". *Transcript of Appeal Hearing*, August 3, 1967, p. 11.

[13] Adequate income supports, including welfare benefits, do make a difference to women who have left batterers. *See* Wendy Pollack, *Twice Victimized—Domestic Violence and Welfare Reform*, 30 Clearinghouse Review, Special Issue 239, 330 (1996). The most likely predictor of whether a battered woman will permanently separate from her abuser is whether she has the economic resources to survive without him. Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 J. of L. and Public Policy 245 (1994); Edward W. Gondolf & Ellen R. Fisher, *Battered Women as Survivors: An Alternative to Treating Learned Helplessness* 95-96 (1988); *see also*, Ida M. Johnson, *Economic, Situational, and Psychological Correlates of the Decision-Making Process of Battered Women*, 73 Fam. in Soc'y: J. Of Contemp. Human Serv. 174-75 (1992); Lewis Okun, *Women Abuse: Facts Replacing Myths*, 55 (1986) (citing studies that find women commonly return because they lack economic resources); B.E. Aguire, *Why Do They Return? Abused Wives in Shelters*, 30 Social Work 350, 350 (1985).

Battered women must have a "sound bridge out of poverty", Edward W. Gondolf & Ellen R. Fisher, *supra*, at 94, in order to afford to live safely and separately from their abusive partners. Battered women who have risked and survived assault following separation from their abuser nevertheless will be penalized by the California durational residency requirement. The inadequacy of the financial assistance provided to new residents may force them to return to violent situations. Alternatively, the denial of adequate assistance may result in homelessness. *See* Joan Zorza, *Women Battering*, 25 Clearinghouse Rev. 421, 422 (1991) (31 percent of abused women in New York City shelters returned to their batterers primarily because they could not locate long-term housing). For a more comprehensive examination of the impact of durational residency requirements on battered women, we respectfully direct the court to the Brief of Amici Curiae Fifty Organizations Serving Domestic Violence Survivors in Support of Respondents.

ARGUMENT

I. THE CALIFORNIA RESTRICTION IMPOSES AN UNCONSTITUTIONAL BURDEN ON MS. ROE'S RIGHT TO TRAVEL AND HER PRIVILEGES AND IMMUNITIES AS A CITIZEN OF THE UNITED STATES OF AMERICA.

The opinions of this Court have consistently affirmed that "[f]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution". *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 901 (1986) (citing cases from *The Passenger Cases*, 7 How. 283 (1849) through *Shapiro v. Thompson*, 394 U.S. 618 (1969)).

Relevant recent cases involving that freedom having relied upon the Equal Protection and Privileges and Immunities Clauses of the Constitution in analyzing the impact of state laws denying public assistance or other governmental benefits to new residents. *See, e.g., Shapiro v. Thompson, supra*; *Zobel v. Williams*, 457 U.S. 55, 71 (concurring opinion of Justice O'Connor) (1986). Both analyses accept as their point of departure the fundamental nature of an individual's right to move from one state to another. This Court's equal protection analysis asks whether the legislative distinction imposes a significant burden arising from the exercise of that right and requires any such burden be justified by proof that the distinction is necessary for the attainment of a compelling state interest. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254 (1974). Other courts have struck down state laws imposing residence requirements for the receipt of public benefits because such restrictions have been found to lack a rational relationship to attainment of a legitimate state purpose. *Hicks v. Peters*, 10 F. Supp.2d 1003 (N.D. Ill. 1998); *Maldonado v. Houstoun*, 117 F.R.D. 311 (E.D. Pa. 1997), *aff'd*, 157 F.3d 179 (3d Cir. 1998).

Courts applying the Privileges and Immunities Clause ask whether a legislative distinction between residents and non-residents (or more recently arrived residents) "burdens" the exercise of a basic right or essential activity. Where a legislative distinction imposes a significant financial burden as a result of an individual's exercise of the right to travel and reside in a new state, those courts ask whether "the non-citizens constitute a peculiar source of the evil at which the statute is aimed" and if so, whether there is "a substantial relationship between the evil and the discrimination practiced against the non-citizens". *Zobel v. Williams*, 457 U.S. 55, 76 (1982) (concurring opinion of Justice O'Connor) (quotations omitted). In *Zobel*, this analysis was applied to strike down an Alaska statute which conferred preferential benefits upon longtime state residents drawn from the state's oil revenues which could amount to no more than $1,050 per year.

The California Restriction is unconstitutional under both the Privileges and Immunities and Equal Protection Clauses. The principal argument advanced by Petitioner State of California is that limiting Ms. Roe's means of subsistence to $307 per month and denying her an additional $258 in public assistance on the ground that she recently moved to California does not constitute a burden on the exercise of the right to travel because she continues to receive the level of public assistance provided by the state of Oklahoma.

That fact is irrelevant to this Court's constitutional analysis under both the Privileges and Immunities and the Equal Protection Clauses. The distinction at issue is that between new and longer-term residents of the State of California. The fact that new residents of California may receive the same level of assistance as residents of Oklahoma or some other state is irrelevant to any conceivable justification of the distinction drawn between new and longer-term California residents. "States must treat residents and nonresidents without unnecessary distinctions . . . ." *Zobel*,

457 U.S. at 76 (concurring opinion of Justice O'Connor) (quotations omitted). In *Shapiro*, the Court struck down a requirement which operated "to create two classes of needy resident families indistinguishable from each of other except that one is composed of residents who have resided a year or more and the second of residents who have resided less than a year, in the jurisdiction." *Shapiro*, 394 U.S. at 627. To say, as does the State of California, that Ms. Roe "would not be any worse off . . . than [she] would have been had [she] not exercised [her] right to travel . . ." is no defense to her claim that she is being discriminated against, as compared to longer-term California residents. Nor is it a denial of the inescapable fact that the state has imposed a burden-laden distinction upon Ms. Roe solely as a result of her decision to move to California.

To argue that the burden imposed upon Ms. Roe is so insubstantial as to merit disregard by this Court is a callous denial of the realities of deprivation described above. The deprivations are unarguably more pervasive and severe than the partial denial of medical assistance in *Maricopa County* or the thousand dollar oil bonus in *Zobel*.

To argue that Ms. Roe has not provided sufficient evidence of the state's purpose to deter poor newcomers is to ignore the evidence described above, including the state's admissions before this Court and the court below. As importantly, it ignores the historical context of the reenactment of durational residency requirements which plainly marks them as an atavistic resurgence of the tendency to brand and confine the indigent newcomer.

While the evidence presented above leaves little doubt concerning California's intent to deter migration of the poor, this Court cannot reasonably make the constitutionality of durational residency requirements imposed upon indigent migrants turn upon the strength of the evidence of specific legislative intent in a particular case. Nor can the outcome

sensibly depend on the varying success with which litigants demonstrate the effect of such restrictions on interstate migration, as a factual matter, from case to case. The predictable variation in outcome which would result from either requirement would disserve both the Privileges and Immunities and Equal Protection Clauses of the Constitution.

To establish the constitutionally relevant burden on the right of travel should require only recognition that the California Restriction necessarily imposes a severe and pervasive burden on poor newcomers which is based on a legislative distinction between new and longer-term residents of a state. That distinction plainly burdens both the individuals' right to travel and their right to be accorded the privileges and immunities accorded by the State of California to its own residents. That course of action would also accord proper recognition to the historical record of discrimination against the indigent migrant. Whether Ms. Roe is labeled a "pauper," a "vagrant" or, in modern parlance, a "welfare queen", she remains the target of a discriminatory attitude of which the nature and necessary effect of the California Restriction is, itself, sufficient proof.

II. NO LEGITIMATE STATE INTEREST JUSTIFIES THE CALIFORNIA RESTRICTION.

Given the burdens imposed by the California Restriction, the state is required to present a persuasive justification, whether the issue be addressed as an Equal Protection question or a Privileges and Immunities question. Under the Privileges and Immunities Clause, the state must demonstrate that: (1) the non-citizens constitute a peculiar source of the evil at which the statute is aimed; and (2) the Court must find "a substantial relationship between the evil and the discrimination practiced against the non-citizens". *Zobel*, 457 U.S. at 76. Phrased in equal protection terms, the state must demonstrate that the distinction serves a state interest. The nature of the state interest—whether legitimate or

compelling—and the precise relationship—whether rational or necessary—depends on this Court's characterization of the state practice involved. To date, the Court has required that a legislative distinction which significantly burdens the right to travel be justified as necessary to the attainment of a compelling state interest. *Shapiro*, 394 U.S. at 634; *Maricopa County*, 415 U.S. at 254; *Soto-Lopez*, 476 U.S. at 911. In *Zobel*, the Court found the Alaska preference discriminatorily awarding an oil bonus to longer-term residents to violate the Equal Protection Clause upon application of the less demanding rational relationship test. *Zobel*, 457 U.S. at 65.

The California Restriction is unjustifiable whatever the test applied. One of the more remarkable aspects of the State of California's brief is that the state makes absolutely no attempt to justify the California Restriction. The Court will search that brief in vain for a section, a paragraph, even a sentence in which the state presents its policy justification for discriminating against poor newcomers. While that failure would be sufficient to dispatch any private litigant, this Court has traditionally been more indulgent in its treatment of public authorities. Any such indulgence in this case would make no difference to its outcome.

No one has suggested any policy reason which could justify the discrimination imposed by the California Restriction. Under the Privileges and Immunities Clause, the state must demonstrate that the non-citizens are a peculiar source of the evil at which the statute is aimed and that there is a substantial relationship between the evil and the discrimination sought to be justified. *Zobel*, 457 U.S. at 76. Under the Equal Protection Clause, the state must, at a minimum, demonstrate that the "distinction" between new arrivals and longer-term residents rationally serves some "valid state interests". *Id.* at 65. None of the interests advanced by the state's amici suggests any valid policy interests which

justify the "*distinction*" between new arrivals and longer-term residents which is the core of the California Restriction.

Ms. Roe's amici start with the fundamental principle that deterring the migration of the deprived is not a constitutionally acceptable state purpose.

> "[T]he purpose of inhibiting migration by needy persons into the State is constitutionally impermissible". *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969).
>
> "The only apparent justification for the retrospective aspect of the program favoring established residents over new residents is constitutionally unacceptable." *Zobel v. Williams*, 457 U.S. 55, 65 (1982).

All of the justifications proffered by the state's amici are constitutionally deficient because they uniformly fail to justify the discrimination imposed by the California Restriction or constitute a reformulation of the constitutionally impermissible purpose of deterring and discriminating against new residents. Amici argue three principal justifications: (1) reducing welfare costs; (2) encouraging work; and (3) eliminating the so-called welfare magnet effect. None of these purported justifications justify the distinction at issue.

Applying Justice O'Connor's analysis under the Privileges and Immunities Clause, new residents are obviously not a peculiar source of poverty in the State of California. In equal protection terms, they are not distinguishable from longer-term residents of California because both groups are equally needy. The constitutional problem arises from the fact that the state refuses to treat equally indigent newcomers in an evenhanded way. The state of California has numerous constitutional means of limiting the costs of welfare. Discrimination against new arrivals is not one of them.

Recasting the argument as a means of warding off the so-called "Race to the Bottom" syndrome, in which states successively slash their welfare benefits, does nothing to justify the discrimination against poor newcomers. For the state to argue that it will reduce benefits to all public assistance recipients if it is not allowed to discriminate against new arrivals is not to justify the discrimination. It is more in the nature of federal blackmail. Once again, the state's asserted interest does not justify the distinction by articulating a legitimate state interest which is applicable to the disfavored group alone. Indeed, it is more in the nature of an admission of the stated discriminatory purpose. The state is saying that if it is allowed to discriminate against the new arrivals, it will treat its favored group of longer-term residents even more favorably. Effective constitutional protection of the disfavored group requires that the state be prohibited from treating the favored class of longer-term residents more favorably.

Similarly, California's desire to increase employment and encourage self-reliance is not an interest which is peculiarly relevant to the situation of new arrivals. Legitimate public interest in encouraging employment may justify a variety of incentives designed to reduce the need to utilize public assistance but it does not justify a distinction which imposes a harsh regime of deprivation on new arrivals alone. The state's interest in fostering employment is incapable of articulation in terms that justify discriminating against poor newcomers.

Finally, the so-called "welfare magnet" theory of exclusion articulates no legitimate justification for the discrimination because it is premised on a violation of the Constitution. *Shapiro* and *Zobel* have clearly stated that the deterrence of poor migrants is a constitutionally impermissible state interest and, despite the changing tenor of judicial opinion concerning the right to travel, no court has ever questioned that fundamental principle. To accept the welfare magnet theory of discriminatory exclusion of poor migrants requires a

repudiation of a long history of judicial decisionmaking under both the Equal Protection and Privileges and Immunities Clauses for which there is no justification.

III. CONGRESSIONAL APPROVAL OF DURATIONAL RESIDENCY REQUIREMENTS DOES NOT IMMUNIZE SUCH STATUTES FROM CONSTITUTIONAL SCRUTINY AND DOES NOT ALTER THE APPLICABLE STANDARD OF REVIEW.

Under the Personal Responsibility and Work Reconciliation Act of 1996 ("PRWORA"), Congress authorized durational residency requirement of the sort contained in § 11450.03. *See* PRWORA, 42 U.S.C. § 604(c). As part of PRWORA, Congress replaced AFDC with a new block grant program known as Temporary Assistance for Needy Families ("TANF"). *See* 42 U.S.C. at §§ 601(a), 604(a) (Supp. 1997). As such, the United States as amicus curiae contends that "in the context of the nationwide, federally funded TANF program, the constitutional question [is] whether the particular limitation adopted by California is sufficiently tailored so that it may fairly be regarded as 'substantially related' to the national governmental interests furthered by that authorization". Brief of United States at 19. That position is untenable.

It is well-settled that "Congress is without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the states to violate the Equal Protection Clause." *Katzebach v. Morgan*, 384 U.S. 641, n.10 (1966). The same is true of the Privileges and Immunities Clause. *See* Tribe, *American Constitutional Law* at 525.[14] The right to

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[14] Laurence H. Tribe, American Constitutional Law § 6-33, at 525 (2d ed. 1988) ("Properly understood, the privileges and immunities clause of article IV, § 2, likewise confers a personal right against state action unjustifiably discriminating against out-of-stater, whether or not such

travel has been held to be part of the liberty protected against actions of the federal government by the Fifth Amendment. *Kent v. Dulles*, 357 U.S. 116, 125-26 (1958). *See also*, *Aptheker v. Secretary of State*, 378 U.S. 500, 505-06 (1964). This fundamental tenet of Constitutional law cannot be abrogated merely by demonstrating that the state has "sufficiently tailored" an otherwise unconstitutional scheme or that the scheme is "substantially related" to such congressional objective.

The court below specifically addressed the question of whether congressional enactment of the PRWORA with its language approving residency requirements affects the Ninth Circuit's pre-PRWORA holding that residency requirements were unconstitutional and correctly determined that Congress' passage of PRWORA "does not affect the constitutional analysis". *Roe*, 134 F.3d at 1404. That PRWORA may intend to encourage states to implement "experimental" welfare programs or that PRWORA itself constitutes a "change in the welfare system as we know it" provide no basis for exemption from the requirements of the Privileges and Immunities and Equal Protection Clauses.

Congress' power to pass welfare legislation or control the use of federal funding provide no legitimate basis for reinventing the applicable standard of review to be employed by federal courts. Congress' ability to alter the constitutional calculus employed by the federal courts must be based, at a minimum, on some textual constitutional source, not on merely the strength of Congress' coffers.

Any legislative distinction, whether state or federal, which burdens a poor newcomer's right to travel must meet applicable constitutional requirements. At minimum, any such distinction must be justified by reference to some policy which rationally and constitutionally distinguishes between poor

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discrimination has purportedly been sanctioned by Congress.").

newcomers and longer-term residents. The justification must be based on some policy which is applicable to the newcomer and not the longer-term resident. And the justification cannot constitutionally be any form of limitation on the poor newcomer's right to travel and settle in another state. The brief submitted by the United States as amicus conspicuously fails to do that.

The United States describes the ostensibly justifying purpose as "achieving interstate integration and coordination, preventing the distortion of incentives and promoting the effectiveness of the federal program"—a formulation so vague as to articulate no rational basis for differentiating between poor newcomers and longer-term residents (Brief of United States at 10).

To the extent that the United States attempts any more particularized policy statement, it falls into the same deficiencies as plague the state's other amici. The United States seeks to justify imposing discriminatory treatment of poor newcomers either by appealing to factors which do not rationally differentiate between the two classes of recipients (*i.e.*, encourage public assistance recipients to work; encourage states to give higher levels of public assistance); or to factors which constitute an admission of an intention to deter interstate migration by public assistance recipients (the so-called welfare magnet theory) which would otherwise take place—a constitutionally impermissible purpose.

CONCLUSION

For the foregoing reasons, we respectfully submit that the California Restriction is unconstitutional under both the Equal Protection Clause and the Privileges and Immunities Clause. The Ninth Circuit's judgment should be affirmed.

December 8, 1998

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1998

ELOISE ANDERSON, DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, *et al.*,
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v.

BRENDA ROE AND ANNA DOE, on behalf of themselves and all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CATHOLIC CHARITIES USA, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE USA, LUTHERAN SERVICES IN AMERICA, AMERICAN FRIENDS SERVICE COMMITTEE AND AMERICAN JEWISH COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Each of the *amici* provides services to the disadvantaged and has a strong interest in opposing the improper denial of welfare benefits.[1]

[1] Written consent to the filing of this brief has been obtained from the parties. Copies of the consent letters accompany this brief. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or part by counsel for any party and that no party or entity, other than the *amici* and their counsel, made any monetary contribution to the preparation or submission.

Catholic Charities U.S.A. is the nation's largest private social service organization. Its network of 1,400 agencies and institutions serves more than 10.5 million people of all religious, national, racial, and social backgrounds each year. Catholic Charities' services emphasize enabling people to achieve self-sufficiency.

The National Council of the Churches of Christ in the U.S.A. (NCC) is the nation's oldest and largest ecumenical body representing 35 Protestant, Anglican and Orthodox member communions that have an aggregate membership in excess of 53 million. The NCC does not purport to speak for all of its members but rather for its 270-member General Assembly.

Lutheran Services in America is an alliance of the Evangelical Lutheran Church in America, the Lutheran Church – Missouri Synod and their social ministry organizations. Lutheran Services in America provides social services, housing and health care in 3,000 communities across the United States, through 97,000 employees who deliver $3.2 billion in services annually. As a basic principle, Lutheran Services in America is called to give these social ministry organizations an effective voice for service and justice to church, to government, and to society.

From its creation eighty-one years ago, the American Friends Service Committee has worked across the United States and internationally in support of the efforts of poor and excluded groups to overcome economic deprivation. The AFSC carries out its work as a social justice arm of the Religious Society of Friends (Quakers). Over these years the AFSC has worked in partnership with low income people seeking fairness and security for people who need public assistance. In February 1998, the AFSC adopted a statement entitled *The Human Crisis of Welfare Reform*, which states that ". . . government at all levels has an essential

responsibility to assure economic security." As a national religiously-based organization with offices in California, AFSC has a strong interest in this litigation, which affects this state and the nation as a whole.

The American Jewish Committee ("AJC"), a national organization of approximately 50,000 members founded in 1906, is dedicated to defending the civil, political, and economic rights of all Americans. AJC has a long history of activism on the issue of public assistance to the poor and is committed to advocating policies that seek to combat poverty, to preserve and promote families, and to enhance self-sufficiency. AJC is especially sensitive to the need for open and liberal migration and immigration policies, which have proved critical to Jews the world over and are central to the American federal framework. We should remember that our nation is a country founded and enriched by those who had the courage and fortitude to seek out opportunity in order to create prosperous and secure homes for their families.

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, Section 2 provides as follows:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Amendment XIV, Section 1 provides in part as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Section 11450.03 of the California Welfare and Institutions Code provides that welfare payments to any family that moved from another State and has resided in California for less than twelve months are limited to the amount the family would have received in its State of prior residence. Respondents, former residents of Oklahoma and the District of Columbia who are now concededly bona fide residents (and therefore citizens) of California, brought this suit challenging § 11450.03 on the ground that it impermissibly burdens their right of interstate migration and denies them equal protection of the laws with other California citizens. The district court preliminarily enjoined the operation of § 11450.03, and the court of appeals affirmed, stating that "the apparent purpose of § 11450.03 was to deter migration of poor people to California." (Pet. App. at 9.)

SUMMARY OF ARGUMENT

One of the most basic principles of our federal union is that "a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 80 (1872). Citizens choose States, and not the other way around. Citizens choose States for a wide variety of reasons: economic opportunity, responsive government, unintrusive government, high benefits such as good schools or superior care for the elderly, low income or inheritance taxes, space and physical beauty, and personal and family attachments. Whatever the individual's reasons, a State is not free to deny residence to any citizen of the United States, or to deny the benefits of State citizenship to any such resident, or to "requir[e] newcomers to accept a status inferior to that of all oldtime residents of [the State] upon their arrival." *Attorney*

General of New York v. Soto-Lopez, 476 U.S. 898, 922 (1986) (O'Connor, J., dissenting).

Our federal union *works* because citizens of the United States can freely choose their States. It works as a system of government because the States compete to offer governmental policies that citizens of the United States will find attractive—and are *not* free to cater only to current residents and other persons of their own choosing. *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("government [is made] more responsive by putting the States in competition for a mobile citizenry"). Our national economy works better because citizens can migrate freely to States where they perceive attractive economic opportunities and protections—and States are *not* free to reserve their opportunities or protections for their current citizens. *See Soto-Lopez*, 476 U.S. at 908-09. And federalism protects individual freedom in part by enabling each individual to escape any State sovereign he or she finds oppressive and choose a more congenial one.[2]

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[2] There is no better example of the central importance of the right to migrate within the United States, and of how this right protects political liberty, than the Great Migration of blacks to the North after the Civil War. *See* 1 Gunnar Myrdal, *An American Dilemma* 182-201 (1944); *see also* David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 Tex. L. Rev. 781, 783 (1998) ("Group migrations were significant for several reasons. . . . [S]uch migrations were sometimes a form of political protest, one of the few forms of protest in which disenfranchised African-Americans could engage. African-Americans frequently deserted regions in response to lynchings and other forms of white lawlessness, or in response to unfavorable legislation. African-Americans would move to places where they were relatively well treated or had relatively good economic prospects. . . . Finally, and perhaps most important, mass migration, and even the threat of such migration, was crucial to improving the treatment of African-Americans by white Southerners.") (footnotes omitted).

Each citizen's right to choose and to change his or her State of residence and citizenship is "so elementary [that it] was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." *United States v. Guest*, 383 U.S. 745, 758 (1966). Like other rights that are central to the very nature of citizenship in our federal union (*e.g.*, voting rights), the right to choose one's State is reflected throughout the constitutional text. The provisions that provide the direct foundation for each citizen's right to choose his or her State of residence are found in Article IV and the Fourteenth Amendment.

The Privileges and Immunities Clause of Article IV, which bars each State from denying citizenship privileges to citizens of other States, by necessary implication also bars a State from denying such privileges to its own citizens on account of their *former* residence in another State. The Fourteenth Amendment adds three clauses that, in the aggregate, define the origin of citizenship and prohibit a State from infringing on that right. First, the Citizenship Clause prescribes the sources of both federal citizenship (native birth or naturalization) and State citizenship (residence in the State) and requires each State to accept, as a citizen, any citizen of the United States who chooses to become a bona fide resident of the State. *See* U.S. Const. amend. XIV, § 1. Second, the Privileges and Immunities Clause bars each State from denying any citizen of the United States the privileges and immunities of national citizenship—which under the Citizenship Clause include the right to choose one's State of residence (and therefore of state citizenship). *Id.* Third, the Equal Protection Clause prohibits any State from denying the "equal protection of the laws" to any person within its jurisdiction. *Id.* As interpreted by this Court, the Equal Protection Clause bars a State from granting benefits to some of its citizens and denying them to others without appropriate justification; once an individual has established

bona fide residence (and hence citizenship) in a State, former residence in a different State is *never* an acceptable justification for significantly different treatment.

The obvious purpose of § 11450.03 is to deter undesired citizens of other States—poor people who need welfare assistance or fear that they might—from choosing to become residents and citizens of California. It achieves that end by dividing California's own citizens into more than fifty different classes, based on where they (or, in the case of newborns, their parents) resided a year earlier; it then grants higher welfare benefits to those who resided in California (or France) and lower benefits to those who (or whose parents) resided in Oklahoma or the District of Columbia. As the Solicitor General acknowledges more forthrightly than California does, the only conceivable reason for limiting welfare benefits for California citizens to levels established by their States of former residence is to keep the poor, quite literally, in their places. (*See* U.S. Br. at 20.)

California cannot constitutionally erect this significant barrier—and the whole premise of California's statute and of its argument in this case must be that it *is* a significant barrier[3]—to migration of United States citizens into the State.

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[3] This is not to say that California's premise is either (i) correct or (ii) a complete statement of the consequences of the California one-year requirement.

(i) Citizens of other States who learn that California has higher stated benefits surely also learn about California's higher cost of living. Whether anyone is actually motivated to move to California by the promise of higher stated benefits thus remains to be shown. But materials filed in this case seem to show that poor people who move tend, on average, to move to States with *lower* benefits, while other people, as one would expect, move in equal numbers to states higher and lower on the benefit scale. Poor people therefore apparently tend, when they move, to seek a lower cost of living rather than higher benefits. (*See* Brief for

(continued...)

California may, of course, deny some of the benefits of California citizenship (*e.g.*, in-state university tuition levels) to *non*-California citizens, *see Vlandis v. Kline*, 412 U.S. 441 (1973), and it may establish durational and other requirements designed to assure that claims of residence are bona fide, *see Sosna v. Iowa*, 419 U.S. 393 (1975); there is, however, no contention in this case that respondents are not bona fide residents and full citizens of California with an intention to remain in California indefinitely.

California may not, however, establish a benefit program, set levels of benefits it deems appropriate for California citizens, and then reserve those benefit levels for long-term citizens in order to deter migration by other citizens of the United States seeking the same benefits. *See* William Cohen, *Equal Treatment for Newcomers: The Core Meaning of National and State Citizenship*, 1 Const. Commentary 9, 17 (1984) ("A state's decision that old-timers deserve a greater share of state-owned resources cannot be squared with a constitutional structure that demands that newcomers be treated as full members of the state community.") A State may choose to impose low taxes on its residents, but it obviously cannot "protect" this policy against tax-motivated

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[3] (...continued)
Social Scientists.)

(ii) The one-year requirement clearly penalizes persons who did *not* enter the State with any expectation of seeking welfare benefits: an immigrant from Oklahoma who has never sought or thought about welfare benefits, and who comes to California because her employer transfers her, or to accept a promised job, or to flee an oppressive husband, and who then loses her job, is limited during her first year of residency in California to the benefits she would have received if she had lost her job in Oklahoma; a child born within California to parents who recently migrated to California is similarly limited to benefits set by a State with which the child may have no connection whatsoever. (*See* Pet. App. at 18.)

in-migration by taxing new residents at the rates set by their former States. *Cf. Williams v. Vermont*, 472 U.S. 14, 23 (1985). A State may choose to provide especially good schools, or outstanding support for the elderly, or superior welfare benefits, but it cannot "protect" any of these policies by denying them to bona fide but new State residents. Even if participation in a federal union sometimes deters a State from offering benefits that might make that State too attractive to other Americans—a problem of which there is no evidence here—barriers against interstate migration are not an acceptable solution.

Congress does not have the power to authorize a State to discriminate against new State citizens in order to deter in-migration by persons seeking benefits the State chooses to provide. The right of each citizen of the United States to choose his or her State of residency is not a mere corollary of the freedom of interstate commerce. It is a right of national citizenship inherent in the structure of government created by the Constitution and specifically protected against both federal and State abridgement by the Citizenship Clause of the Fourteenth Amendment. *See Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (characterizing the right to migrate as a "fundamental personal right"). Nothing in the Constitution gives Congress the power to curtail, or authorize States to curtail, that right of national citizenship.

ARGUMENT

THE CALIFORNIA WELFARE RESIDENCY LAW IS UNCONSTITUTIONAL BECAUSE IT LIMITS WELFARE BENEFITS PAID TO CERTAIN BONA FIDE CITIZENS OF CALIFORNIA SOLELY BECAUSE OF THEIR FORMER RESIDENCE IN OTHER STATES

Every citizen of the United States has a right to choose, and change, his or her State of residency and citizenship. Each individual may base his or her choice upon any set of perceived advantages that each State offers its citizens, including the kinds and magnitude of governmental benefits. Each State, in turn, may decide what benefits to provide its citizens and may allocate such benefits on the basis of any appropriate classifications. But no State may *choose* its citizens, or reserve its benefits for *current* State citizens, or seek to deter undesired migration of other United States citizens by classifying its own citizens on the basis of their former residence in other States.[4] Specifically, California cannot protect its supposedly superior welfare benefits by

[4] A State's decision to limit a citizen's access to necessities—*e.g.*, health care or subsistence cash payments—on account of recency of migration is particularly troubling. *Cf. Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 259 (1974) ("governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements"). One reason for this is that there is an exaggerated effect on the right to migrate itself: a person who might wish to locate in a particular State for a combination of reasons, and whose concern with (say) health care is only one minor point, may nevertheless be deterred from migrating at all if she fears that an unexpected health problem could be catastrophic. Similarly, a person otherwise eager to come to California to accept a better job, and who has no history or expectation of relying on welfare, may be deterred by the thought that if the job does not pan out she will be living in a new and more expensive State with assistance mysteriously limited by her State of former residence.

denying such benefits to some of its own citizens in order to deter in-migration, and Congress cannot authorize California to do so.

A. It Is a Basic Principle of Our Federal Union That Every Citizen of the United States Has a Right To Choose, and Change, His or Her State of Residency and Citizenship

As Justice O'Connor said in the *Zobel* case,

> It is difficult to imagine a right more essential to the Nation as a whole than the right to establish residence in a new State. Just as our federal system permits the States to experiment with different social and economic programs, it allows the individual to settle in the State offering those programs best tailored to his or her tastes.[5]

The principle that every citizen of the United States enjoys a right to change State of residency and therefore citizenship is—but is not merely—a matter of individual rights. *See Dunn*, 405 U.S. at 338. Even more importantly, as Justice O'Connor recognized, it is a structural principle of our federal union. *See Zobel*, 457 U.S. at 73. States choose their governmental policies, but individual citizens of the United States choose States on the basis of all their policies and other amenities. In a federal union, States are encouraged to be "laboratories,"[6] experimenting and competing to offer attractive conditions of life, precisely because they are *not*

[5] *Zobel v. Williams*, 457 U.S. 55, 76-77 (1982) (O'Connor, J., concurring) (citation omitted); *see* Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 518 (1981).

[6] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

permitted to cater only to the people who already live there.[7] And federalism protects the liberties of individuals precisely because the freedom to migrate between States means that each individual is subject to two chosen sovereigns, not confined in a single (albeit joint) sovereignty. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring); *Zobel*, 457 U.S. at 73 (O'Connor, J., concurring). Accordingly, the right of each citizen to choose and to change his or her State of residence has been recognized from the early days of the Republic. *See generally Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230) (holding that fundamental rights protected by Privileges and Immunities Clause of Article IV include "[t]he right of a citizen of one state to pass through, or to reside in any other state").[8]

Like other very fundamental principles, the right to choose one's State of residency and therefore

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[7] Petitioner and its *amici* concede, in varying degrees, the right of Citizens of the United States to choose and change their State of residence. (*See* Pet. Br. at 15, 26; Inst. for Justice Br. at 5; Brief for Washington Legal Found. at 13; Brief for Pacific Legal Found. at 15; Brief for Pennsylvania *et al.* at 5-6.)

[8] The point is not merely theoretical. Statutes like § 11450.03 pose a serious threat to the national mobility of poor people (including people who are working but fear that they could need welfare assistance). Fifteen states apparently now "provide that new residents receive [welfare cash] benefits at the level received in their prior State until one year has elapsed." (Brief for the Nat'l Ass'n of Governors Br. at 12 & n.4.) The proliferation of such laws will keep the poor literally in their places, deterring migration to more prosperous States, even though such migration is exactly what a country with a national economy should seek to encourage. *See Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986) (mentioning "the important role that [right of interstate migration] has played in transforming many States into a single Nation"); *cf. Healy v. Beer Inst.*, 491 U.S. 324, 337 (1989) (noting that Commerce Clause was intended to preclude "interlocking local economic regulation").

citizenship—the "Choice of State Principle"—is embodied in more than one provision of the Constitution.[9] As *amicus* Institute for Justice concedes (Inst. for Justice Br. at 5), the "right to migrate . . . is a descendant of Article IV Privileges and Immunities and now the Fourteenth Amendment as well." In the beginning, the Privileges and Immunities Clause of Article IV was intended to guarantee citizens of any of the United States the right to move about and be recognized as such in any other State in the Union. *See Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868); *Campbell v. Morris*, 3 Har. and McHen. 535, 553 (Md. 1797). In that regard, the Clause embodies the principle expressly articulated in Article IV of the Articles of Confederation, *see* 3 M. Farrand, *Records of the Federal Convention of 1787*, at 112 (1934), which provided explicitly for a right of ingress and egress between States. Articles of Confederation art. IV, para. 1 (1781). But, in *Scott v. Sandford*, 60 U.S. (19 How.) 393, 417-18 (1856), this Court tragically held that the privileges and immunities protected under Article IV, Section 2 were limited to rights authorized by State law.[10]

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[9] *See* Zechariah Chafee, Jr., *Three Human Rights in the Constitution of 1787* at 189-92 (1956) (disapproving of traditional sources for right and advocating adoption of due process liberty rationale); Duane W. Schroeder, Comment, *The Right to Travel: In Search of a Constitutional Source*, 55 Neb. L. Rev. 117, 117-22 (1975) (explaining textual sources of right); *cf. Sigler v. Berrigan*, 410 U.S. 902, 902 (1973) (Douglas, J., dissenting) ("The right to travel is a peripheral right of every citizen under the First Amendment.").

[10] There is historical evidence that, even prior to the Court's 1856 decision in *Dred Scott*, southern States consistently ignored Article IV by failing to grant abolitionists or freed slaves the privileges and immunities associated with their citizenship in northern States. *See Elkison v. Deliesseline*, 8 F. Cas. 493 (D.S.C. 1823) (No. 4,366) (holding unconstitutional a South Carolina law mandating incarceration, during the pendency of his ship's stay in port, of any freed black sailor whose ship docked in the State); Paul Finkelman, *An Imperfect Union* 109-11 & n.28

(continued...)

The Fourteenth Amendment overruled *Dred Scott* in two important steps. First, it declares that any citizen of the United States must be recognized as a citizen by the State in which he or she chooses to reside. *See* U.S. Const. amend. XIV, § 1. As a result of the Fourteenth Amendment, "a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 80 (1872). The Citizenship Clause thus requires that each United States citizen be accepted as a citizen of the State in which he resides, as long as he is "without any present intention to remove therefrom." *Martinez v. Bynum*, 461 U.S. 321, 331 (1983). Second, the Privileges and Immunities Clause of the Fourteenth Amendment bars any State from abridging its citizens' rights of national citizenship. *See Thornton*, 514 U.S. at 843-44 (Kennedy, J., concurring). And one of those rights of national citizenship is the right to change residence from one State to another. On this point, Justice Jackson had it exactly right:

> This Court should . . . hold squarely that it is a privilege of citizenship of the United States, protected from state abridgment, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing.

Edwards v. California, 314 U.S. 160, 183 (1941) (Jackson, J., concurring). Finally, the Fourteenth Amendment also bars

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[10] (...continued)
(1981); *cf.* Paul Finkelman, *States' Rights North and South in Antebellum America, in An Uncertain Tradition* 125, 151 n.18 (Kermit L. Hall & James W. Ely, Jr. eds., 1989) (discussing mistreatment of white abolitionists by Southern authorities).

any State from denying any person the equal protection of the laws. A State may not accord different benefits to different classes of its own citizens without an appropriate justification, and this Court has repeatedly held that former residence in another State is no justification at all. *See, e.g.*, *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 n.6 (1985); *Zobel*, 457 U.S. at 60 n.6; *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 261 (1974); *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969).

The Court's right to travel jurisprudence, like its decisions concerning the right to vote, fits squarely at the center of the "rational continuum" of rights upon which liberty depends. *See Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). And the Court's uninterrupted endorsement of the "Choice of State" principle from the earliest days of the Republic affirms that each U.S. citizen's right to take up residence, and by implication citizenship, in any State is "deeply rooted in our legal tradition." *Washington v. Glucksberg*, 117 S. Ct. 2258, 2268 (1997); *cf. Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992) (holding that settled doctrine should be disturbed only in extraordinary circumstances).

The Choice of State principle obviously means that California simply cannot say, "We do not want, and will not allow, citizens of Oklahoma (or the District of Columbia, or other States generally) to migrate and take up residence here." Equally obvious, California cannot erect such barriers against *subsets* of residents of other States. Thus, California cannot say, "We do not want, and will not allow, poor citizens of Oklahoma, or citizens of Oklahoma with many children who will fill up our schools, to migrate and take up residence here."

Nor may California bar a discrete class of immigrants—in this case the poor—from entry by denying to all new

California citizens a benefit to which all other eligible Californians are entitled. That is to say, the Choice of State principle prohibits both direct impediments to entry and indirect policies designed to effect the same end. *Cf. Harman v. Forssenius*, 380 U.S. 528, 540-41 (1965) (noting that the right to vote is protected from "sophisticated as well as simple-minded modes of impairing the right guaranteed" (quotation omitted)); *Smith v. Allwright*, 321 U.S. 649, 664 (1944) (noting that "[c]onstitutional rights would be of little value if they could be . . . indirectly denied"). As one scholar has summarized:

> United States citizens become citizens of the States wherein they reside. There are no waiting periods. And, just as it would violate the Constitution to deny these new arrivals state citizenship, it would violate the Constitution to concede their citizenship in name only while treating them as if they were still citizens of other states. That should mean that it is unconstitutional to deny benefits to new citizens that are extended to other citizens similarly situated—subject only to reasonable assurances that claims of new residence are bona fide.

William Cohen, *Discrimination Against New State Citizens: An Update*, 11 Const. Commentary 73, 79 (1994) [hereinafter Cohen, *Update*].

A State may, of course, deny some of the benefits of California citizenship to persons who are physically present but are *not* citizens. *See, e.g., Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978) (permitting imposition of surcharge on hunting licenses sold to nonresident hunters). Moreover, although a State must accord State citizenship to any resident, it may insist on bona fide residence and may sometimes impose duration requirements as a way of

establishing the requisite commitment to the State.[11] But there is no dispute in this case that respondents are bona fide residents and citizens of California, and neither California nor the United States has suggested that the requirement at issue is designed to weed out persons whose claim of residence is not genuine. Petitioners and their *amici* cite *no* case holding that a State may distinguish among admittedly bona fide citizens based on duration of residency. Citizenship is an indivisible status that may not be granted in half steps. *See Dunn v. Blumstein*, 405 U.S. 330, 341 (1972).

B. Section 11450.03 Violates the Constitutional Choice of State Principle and Denies Equal Protection to Citizens of California

The constitutional right to interstate travel, which is a privilege and immunity of national citizenship, "is virtually unqualified." *Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978). That right is composed not only of a right of ingress and

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[11] This Court's decisions sustaining duration-of-residence requirements for particular State benefits have been explained by the Court itself, or are readily explainable, as based on the State's right to insist on genuine residency. *See, e.g., Martinez v. Bynum*, 461 U.S. 321, 328 (1983) ("A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents."). *See* William Cohen, *Equal Treatment for Newcomers: The Core Meaning of National and State Citizenship*, 1 Const. Commentary 9, 18-19 (1984). In particular, in the case of transportable benefits such as a divorce decree or a college education, the Court has allowed States to impose duration requirements rather than accord these benefits to individuals who may be merely passing through. Petitioner suggests that *Sosna v. Iowa*, 419 U.S. 393 (1975), endorses "temporary depriv[ation] . . . of . . . right[s]" to newcomers. (*See* Pet. Br. at 26.) But in *Sosna*, which upheld a one-year residency requirement to obtain a divorce, the provision in question was a reasonable expression of the State's desire to ensure that those seeking divorces were bona fide residents, not transients seeking to use the State's liberal divorce laws. *See* Cohen, *Update*, *supra*, at 74.

egress, *see Passenger Cases*, 48 U.S. (7 How.) 283 (1849), but also of a right to settle in the State of one's choice, *see Edwards v. California*, 314 U.S. 160, 173-74 (1941). A State may not inhibit an individual's right to choose his or her State of residence by penalizing new citizens for the recency of their arrival, *see Hooper*, 472 U.S. 612; *Zobel*, 457 U.S. 55; *Soto-Lopez*, 476 U.S. 898, or by discouraging them from coming at all, *see Williams v. Vermont*, 472 U.S. 14 (1983); *Shapiro*, 394 U.S. 618; *Edwards*, 314 U.S. 160. Section 11450.03 does both: it inhibits individuals' exercise of the right to choose California by curtailing the extent of state citizenship to which recent immigrants are entitled upon arrival in California. *See Zobel*, 457 U.S. at 59 n.6.

As the courts below recognized (Pet. App. at 9, 29-30), the sole purpose of Section 11450.03 is to deter residents of other States from moving to California if they will, or have any fear that they soon may, apply for welfare benefits. That purpose is not constitutionally permissible, and California cannot constitutionally discriminate among its own bona fide citizens in order to achieve it.

Although California in its brief before this Court neither acknowledges that its purpose is to deter in-migration by citizens of other States who will or may need welfare assistance nor articulates any other purpose served by the provision,[12] there is simply no other intelligible reason for California to divide its citizens into more than fifty classes based on States or territories of former residence, and then to

[12] In oral argument below, "the state conceded that it does not want people to move to California 'with a mind-set of economic dependency'." (Pet. App. at 10.) California also argued below that the provision saves money (*id.* at 26), but if its only purpose were to lower its costs, it obviously could do so far more simply by a very small across-the-board reduction (*id.* at 31 n.20). If California had some justification for providing lower benefits to first-year residents, it could also do that in a simple, across-the-board manner.

administer more than fifty different sets of benefit limits. The limits established by the Oklahoma legislature have no relevance to the appropriate level of support for respondent Roe *as a bona fide resident and citizen of California*. That level has been established by the California Legislature for all residents of California, and Roe's former residence in Oklahoma has no bearing on her present needs or deserts. The Oklahoma-based limit serves no purpose as applied to California citizens, who have already left Oklahoma behind, except to save a small amount of money by an arbitrary discrimination.[13] California's adoption by reference of Oklahoma's limit is explicable only by examining its effect at the point when a resident of Oklahoma is deciding whether to move to California. Its purpose is to say *at that point*, "Don't come thinking you will get higher benefits here, because you won't for a year, so stay where you are."

Section 11450.03 therefore violates the Constitution in two ways. First, it violates the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment by denying to citizens of *other States* the right to take up residence in California and receive the full benefits that California confers on its citizens. Second, it violates the Privileges and Immunities and Equal Protection Clauses of the Fourteenth Amendment by denying to some citizens of *California* benefits conferred on other Californians, without any constitutionally permissible justification for the distinction.

The Privileges and Immunities Clauses, which embody a right of citizens of one State to migrate to another State and be accorded full rights of citizenship there, do not permit

[13] The State's discrimination is arbitrary (1) because it assigns benefits according to no discernible principle of California public policy and (2) because the amount to which any individual recipient is entitled bears no relation to her status as a California citizen.

California to deny full California citizenship to former residents of Oklahoma or the District of Columbia. Citizens of other States may move to California seeking any number of perceived benefits: beautiful scenery, extensive job opportunities, better schools, lower taxes, better support for the elderly or the indigent. The very nature of national citizenship, embodied in the Clauses, means that California cannot reserve these benefits for its own *current* citizens and others of its own choosing.

Examples abound. California may want to limit development of its coastline, but it obviously cannot do so by singling out newcomers from other States and barring them from buying or building houses with ocean views. California may want to protect its special economic opportunities, but it cannot specially deny new citizens from other States the right to search for gold or manufacture computers. California may want to prevent school overcrowding, but it cannot refuse school places to new citizens in order to eliminate this motive for migration. Welfare benefits are merely one of the features of California citizenship, and like the others they cannot be denied to new California citizens in order to deter migration. *Cf. Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) ("The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not in division.")

The Equal Protection Clause of the Fourteenth Amendment bars California from granting a benefit to one class of its own citizens, and denying the benefit to another class, without an acceptable justification for doing so. Whether the justification need be merely "rational," or must be "substantial" or "compelling," depends on the nature and importance of the benefit and on whether the classification is

itself "suspect." If the Court addresses this level-of-scrutiny question in this case, it should adhere to its past rulings that the right of every citizen of the United States to choose his or her State of residence is so fundamental that a State classification based on recent exercise of that right is suspect and requires a compelling justification. *See Shapiro*, 394 U.S. at 627; *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 257 (1974); *Dunn v. Blumstein*, 405 U.S. 330, 339-40 (1972). But this case can be decided without reference to level of scrutiny, because the only proffered justification for treating citizens of California differently depending on where they *formerly* lived—the need to eliminate an incentive for migration—is not a constitutionally permissible justification *at all*.

This justification is proffered not by California but by the Solicitor General, who argues that State laws like Section 11450.03 serve two related purposes: first, to allow the States to eliminate any incentive to migrate from a low-benefit State to a high-benefit State; second, to prevent a "race-to-the-bottom," in which each State, fearing an inundation of applicants, seeks to keep its benefits the lowest in the Nation.[14] But both of these purposes are permissible only if a State may attempt to deter migration by citizens of the United States who are seeking benefits that the State has chosen to offer its citizens. As the Solicitor General concedes, both of his purposes are achieved only if, and only to the extent that, laws like Section 11450.03 actually deter,

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[14] The postulated worries are not entirely plausible. As to welfare migration, see *supra* n.3. As to the "race to the bottom," very significant differences between state welfare benefit levels have persisted despite this Court's decision 29 years ago in *Shapiro*, a fact which suggests that high-benefit States have sufficient in-state reasons to keep their benefits high. The more likely real motive behind Section 11450.03 and similar provisions is that States simply prefer not to have to accord full benefits to even a few poor newcomers.

or at least are perceived to deter, interstate migration that would otherwise take place.[15] Although the Solicitor General has carefully phrased his statement of purposes to avoid implying any State animus against poor immigrants from other States, the burden on interstate migration is not incidental; it is purposeful and direct. California's intention is to provide what it thinks is an appropriate level of support for its own *current* citizens, while at the same time preventing poor people from Oklahoma and other States from moving in and getting the same benefits.

There are all kinds of benefits and amenities of citizenship in a given State that the State may wish (i) to reserve for current residents, (ii) to neutralize as incentives for undesired in-migration, or (iii) to preserve against the risk that they will be destroyed or rendered impractical by excessive demand.[16] But a State cannot achieve any of these objectives by discriminating against its new citizens.

Consider, for example, State recreational opportunities. A State may wish to provide its current citizens very attractive State parks but fear that (i) if too attractive they will become overcrowded, (ii) they will induce migration to the

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[15] *See, e.g.*, U.S. Br. at 12 (quoting H.R. Rep. No. 104-651, at 1337 (1996) to the effect that the evil to be prevented is families moving "across State lines to maximize welfare benefits"), 13 (quoting *States' Perspective on Welfare Reform: Hearing Before the Senate Comm. on Finance*, 104th Cong. 9 (1995) (statement of Sen. Graham) (saying that it "is not in the nation's interest to be trying to stimulate that kind of population movement [created by welfare discrepancies]"), 14 (welfare recipients should not be "transient"), 16 ("race to the bottom" caused by fact that "there is no restriction on interstate migration").

[16] Our whole tradition is, of course, to the contrary: it assumes that States will adopt attractive policies in order to compete for citizens: "That choice of residence was subject to local approval is contrary to the inescapable implications of the western movement of our civilization." *Edwards*, 314 U.S. at 183 (Jackson, J., concurring).

State when it would prefer to limit its population, and (iii) *the State legislature and its current population will be much less willing to spend State funds to support State parks if their use cannot be limited to current citizens and must be shared with newcomers*. These arguments about the effects of State spending on parks are exactly parallel to the Solicitor General's arguments about State spending on welfare benefits. Moreover, they are logical and plausible arguments that may well support steps at the federal level to offset State underspending. But if offered as justifications for denying new State citizens the right to visit State parks, they are clearly impermissible.

Many other examples are equally indistinguishable from welfare benefits in this respect. States may wish to preserve for their current residents, and not share with newcomers, their coastlines, their mountains or forests, their factory job opportunities, their civil service job opportunities, their farmland, the economic benefits of their natural resources, their superior schools, and an unlimited range of governmental policies—relating to taxes, regulation of persons and property, and individual welfare—that they perceive to be superior to the policies of other States. But *as long as the newcomers are citizens of the United States who have chosen to become State residents*, the State is simply not permitted to exclude them from any of these benefits on grounds of newness to the State. Allowing a State to do so would be inconsistent with the principle that citizens of the United States choose their States, and not vice versa. If a State truly cannot afford a particular benefit or policy unless it can deny that benefit or policy to newcomers, then the State must adopt benefits and policies it can afford to share.

Fears of a "race to the bottom" cannot justify States in deterring citizens of the United States from taking up residence in States they find attractive. The mobility of the

national population has many, perfectly genuine, "spillover" effects on State spending, causing spending to be higher or lower than the State would choose if it could limit the benefits to its own current citizens. These effects are often cited as justifications for federal spending or federal restrictions to offset what are perceived to be distortions.[17] But these effects have never been thought to justify limiting the mobility of the population or denying benefits to bona fide migrants. On the contrary, one of the basic virtues of a federal system is that citizens of the United States may "vote with their feet," choosing the State whose laws and policies suit them best. *See Zobel*, 457 U.S. at 77. Benefits offered by the several States, including those that are partially federally funded, are among the reasons people may choose to move to a new State. *All* such choices are preferences of one set of laws and regulation, and one State government, over another.

This Court has repeatedly held that States may not deny benefits to in-migrants from other States merely because they wish to avoid in-migration by persons seeking such benefits. *See Shapiro v. Thompson*, 394 U.S. 618, 631 (1969) (welfare benefits); *Memorial Hosp.*, 415 U.S. at 263-64 (high levels of public health care); *Zobel*, 457 U.S. at 63 (resource dividends); *Soto-Lopez*, 476 U.S. at 905 (veterans' civil service preference). Citizens of one State *may* choose to move to a new State on the basis of any of a wide range of benefits the new State is perceived to provide, including welfare benefits. Neither the new State nor Congress can reserve the benefits of public education, public health, old age care, use of State lands and facilities, or welfare benefits

[17] It is commonplace, for example, that each State tends to underspend on schools because children grow up and move elsewhere, and many advocates of federal support invoke this spillover effect as a reason for the underspending.

for current citizens without changing the meaning of a federal union.

C. Congress Has No Power To Authorize Statutes Like Section 11450.03

After Section 11450.03 was enacted, Congress adopted Section 604(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 604(c), which provides in pertinent part as follows:

> A State operating a program funded under this part may apply to a family the rules (including benefit amounts) of the program funded under this part of another State if the family has moved to the State from the other State and has resided in the State for less than 12 months.

The Solicitor General argues that this congressional approval of a category of State provisions into which Section 11450.03 may fall could save the provision from unconstitutionality. (U.S. Br. at 22.) But nothing in the Constitution empowers Congress (i) to deny or impede (or authorize California to deny or impede) the right of citizens of Oklahoma and other States to take up residence in and become citizens of California or (ii) to deny (or authorize California to deny) to respondents, as bona fide citizens of the United States and California, the full benefits of that citizenship as determined by California. Congress, of course, has plenary power to regulate interstate commerce, but the right at issue in this case does not rest on the Commerce Clause. The right of every citizen of the United States to choose his or her State of residence, and be accorded full rights of citizenship in the chosen State, is not Congress's to give away.

The Solicitor General rests his argument that congressional authorization can legitimize State measures to deter migration primarily on an asserted national interest in

interstate commerce. (U.S. Br. at 23.) But although the Commerce Clause has been said to be one source of the right to travel, *see Edwards v. California*, 314 U.S. 160 (1941),[18] and the Commerce Clause plainly does give Congress the power to regulate the interstate *transportation* of people, *see Passenger Cases*, 48 U.S. (7 How.) 283, 401 (1849), this Court has never to our knowledge suggested that the Commerce Clause gives Congress any power to limit the right of citizens of the United States to migrate to new States. On the contrary, the *Edwards* Court, while basing its decision on the Commerce Clause, distinctly avoided stating that the Clause gives Congress any greater power than the States have to limit the interstate transportation of indigents. *Edwards*, 314 U.S. at 176. The fact that the Commerce Clause protects individuals against State abridgment of the right to travel does not mean that it authorizes Congress to regulate the right of citizens of the United States to choose their States of residency and citizenship, an individual right of national citizenship that does not rest on any grant of power to Congress.[19]

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[18] *See also, e.g., Zobel v. Williams*, 457 U.S. 55, 66 (1982) (Brennan, J., concurring); *Jones v. Helms*, 452 U.S. 412, 419 n.12 (1981); *Shapiro v. Thompson*, 394 U.S. 618, 630 n.8; *United States v. Guest*, 383 U.S. 745, 758 (1966).

[19] Congress also has express power to enforce, by appropriate legislation, the provisions of the Fourteenth Amendment. But as this Court has recently made clear, that is an enforcement power, not a power to define the substantive content of the Amendment. *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164 (1997); *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966). Congress also, of course, has broad power to determine how federal dollars may be spent. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987); *Lau v. Nichols*, 414 U.S. 563, 569 (1974); *United States v. Butler*, 297 U.S. 1, 66 (1936). But neither petitioner nor any amicus has suggested that the spending power entitles Congress to allow California in this case to discriminate on the ground of former residence in another State.

The Solicitor General also suggests (i) that the need to deny any welfare benefit resulting from migration to a new State is somehow an artificial consequence of the welfare system itself (U.S. Br. at 13), and (ii) that Congress's actions should be viewed with less suspicion because Congress does not have the same motives to discriminate against new State citizens as do the States themselves (U.S. Br. at 24-25). Neither of these arguments helps Section 604(c) save what California has done. A State cannot specially exclude new, bona fide in-migrant citizens from using its legislatively *created* benefits any more than it can specially exclude such citizens from its State wilderness areas or from farming its fertile land. And whether or not Members of Congress are less prone to parochial prejudices, the constitutionality of any such exclusion of new citizens does not depend on an examination of the subjective intent of the legislators. The unconstitutional feature of Section 11450.03 appears on the face of the provision: cases from *Shapiro* to *Zobel* and *Soto-Lopez* make it clear that States may not reserve their bounty for longer-term residents in an effort to deter migration.[20]

Finally, the Solicitor General also suggests that Congress has greater power than the States to burden the right to migrate, because Congress has a special interest in "the nature of a national Union, as opposed to a federation of independent States," and because Congress has a special

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[20] The Solicitor General refers to provisions like Section 11450.03 as "specialized choice-of-law rules." But at best that phrase evades the issue. California has *no* basis for "choosing" Oklahoma law to determine California's current benefits to a California citizen. The Solicitor General concedes as much: "Ordinarily, of course, there would be little or no justification for one State, in the administration of its own public benefits laws, unilaterally to apply the standards of *another* State's laws." (U.S. Br. at 24.) The point of Section 11450.03 is to penalize respondent Roe for her *former* residence in Oklahoma, in order to deter migration, and the issue, which cannot be avoided by artful phrasing, is whether California may do that.

relationship to fundamental rights of national citizenship. (U.S. Br. at 23.) This is a deeply troubling argument, because it ignores the fact that Congress itself has only the powers delegated by the Constitution and would give Congress, instead, a roving commission to define national citizenship. Congress does, of course, have specifically delegated powers to regulate how people born outside of the United States may become United States citizens, and to regulate many of the particular benefits and responsibilities of national citizenship, such as the obligation to pay federal taxes. But Congress does not have a floating general power to define the privileges and immunities of national citizenship. It does not, for example, have power to abrogate the "fundamental principle of our representative democracy [that] the people should choose whom they please to govern them." *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (internal quotations and citation omitted). We respectfully suggest that, like the right to choose national leaders, the right of each citizen to choose his or her State of residence and citizenship is a feature of citizenship in a "national Union, as opposed to a federation of States," a right of each citizen guaranteed by the Constitution itself,[21] not a gift from Congress or a benefit Congress may abridge.

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[21] In which, as Justice Kennedy has put it, "the whole people of the United States asserted their political identity and unity of purpose when they created the federal system." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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